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No. 90-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CENTRAL STATES MOTOR FREIGHT BUREAU, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit, in its decision at issue here, altered the rule of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837 (1984), by deferring to the Interstate Commerce Commission construction of 49 USC §10505 without conducting the rigorous review required by Step I of *Chevron*, which would have revealed the intent of Congress on the precise question at issue: the absence of ICC authority, under the railroad portion of the Interstate Commerce Act, 49 USC § 10101, et seq., to exempt from economic regulation transportation not provided by a rail carrier.

LIST OF PARTIES

Petitioners:

Central States Motor Freight Bureau, Inc.; The Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau, Inc.; National Motor Freight Traffic Association, Inc.; New England Motor Rate Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Regular Common Carrier Conference; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference, Inc.

Respondents:

United States of America and Interstate Commerce Commission.

Intervenors:

Association of American Railroads; Intermodal Marketing Association; National Industrial Traffic League; and Pennsylvania Truck Lines, Inc.

Parent Companies and Subsidiaries:

None of the corporate petitioners has a parent company or subsidiary.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES	2
STATEMENT OF THE CASE	3
A. Decisions Of The Interstate Commerce Commission	3
B. Decisions Of The Court Of Appeals	6
BASIS OF FEDERAL JURISDICTION	7
REASONS FOR GRANTING THE WRIT	8
A. The Majority Is Predisposed To Find That Congress Gave Broad Exemptive Authority To The ICC	8
B. *Chevron* Has Been Unevenly Applied By The Circuits And Within This Circuit	10
C. The Majority Has Failed To Conduct Proper Analysis Under Step I Of *Chevron*	14
1. The Plain Meaning Of § 10505	14
2. The Legislative History Of § 10505	18
CONCLUSION	21

APPENDICES:

APPENDIX A – OPINION—United States Court of Appeals for the District of Columbia Circuit (February 1, 1991) 1a

APPENDIX B – ORDER DENYING REHEARING—United States Court of Appeals for the District of Columbia Circuit (March 28, 1991) 32a

APPENDIX C – DECISION—Interstate Commerce Commission (November 27, 1989 ..... 34a

APPENDIX D – TEXT OF CITED STATUTES ... 61a

APPENDIX E – PAGE 12 OF COMMENTS OF AMERICAN INSTITUTE OF SHIPPERS' ASSOCIATIONS, INC., ET AL. 74a

TABLE OF AUTHORITIES

Cases:	Pages
American Trucking Ass'ns v. ICC, 656 F.2d 1115 (5th Cir. 1981)	4,15
Cajun Electric Power Cooperative, Inc. v. FERC, 924 F.2d 1132 (DC Cir. 1991)	12
Central States Motor Freight Bureau, Inc., et al. v. Interstate Commerce Commission and United States, 924 F.2d 1099 (1991) (Appendix A)	1, *passim*
Chemical Manufacturer's Association v. Natural Resources Defense Council, 470 US 116 (1985)	10
Chevron U.S.A. v. Natural Resources Defense Council, 467 US 837 (1984)	i, *passim*
Federal Reserve Board v. Dimension Financial Corp., 474 US 361 (1986)	9,10,11
Immigration & Naturalization Service v. Cardoza-Fonseca, 480 US 421 (1987)	11
Improvement Of TOFC/COFC Regulation, 364 ICC 391; 364 ICC 731 (1981)	4
Improvement Of TOFC/COFC Regulations (Rail Affiliated Motor Carrier And Other Motor Carriers), 3 ICC 2d 869 (1987)	4,5,6
Improvement Of TOFC/COFC Regulations (Pickup And Delivery), 6 ICC 2d 208 (1989)	2,6
International Brotherhood Of Teamsters v. ICC, 801 F.2d 1423 (DC Cir. 1986)	12
Interstate Commerce Comm'n v. Texas, 479 US 450 (1987)	3
Public Service Co. v. FERC, 832 F.2d 1201 (10th Cir. 1987)	13
Rail Exemption Authority—Fresh Fruits And Vegetables, 361 ICC 374 (1979)	4

Table of Authorities Continued

	Page
United States v. Board Of Trustees For U. Of Alabama, 908 F.2d 740 (9th Cir. 1990)	13
Variamparambil v. I.N.S., 831 F.2d 1362 (7th Cir. 1987)	13
Vierra v. Rubin, 915 F.2d 1372 (9th Cir. 1990)	13
Weinberger v. Hynson, Westcott & Dunning, 412 US 609 (1973)	16
Young v. Community Nutrition Institute, 476 US 974 (1986)	10
Zalega v. INS, 916 F.2d 1257 (7th Cir. 1990)	13
Articles:	
Judicial Review Of Administrative Action In A Conservative Era, 39 Adm. L. Rev. 353 (1987)	11
Saunders, *Agency Interpretations and Judicial Review: Search for Limitations On The Controlling Effect Given Agency Statutory Constructions*, 1988 Az. L. Rev. 769	11
Nelson, *The Chevron Deference Rule And Judicial Review of FERC Orders*, 9 Energy L. J. 59	12
Chevron And Cannons Of Statutory Construction, 58 Geo. Wash. L. Rev., 829	12
Pierce, *Chevron And Its Aftermath: Judicial Review Of Agency Interpretations Of Statutory Provisions*, 41 Vanderbilt L. Rev. 301	12
The Chevron Legacy: Young v. Community Nutrition Institute Compounds The Confusion, 73 Cornell L. Rev. 113	12
The Contribution of the D.C. Circuit to Administrative Law, (transcript of program presented at Section of Administrative Law Fall Meeting in October, 1987), 40 Adm. L. Rev. (No. 4) 507, 529-30 (1988)	12

Table of Authorities Continued

	Page
Silberman, *Chevron—The Intersection Of Law And Policy*, 58 Geo. Wash. L. Rev. 821	13
Statutes:	
Judiciary and Judicial Procedure	
28 USC § 1254(1)	2
§ 2321	2,7
§ 2342(5)	2,7
§ 2343	2,7
Interstate Commerce Act	
49 USC § 12(1)(b) [repealed 10/17/78]	2,19
49 USC § 10322(b)	20
49 USC § 10501(a)	2,4
49 USC § 10505	i, *passim*
49 USC § 10505(a)	5, *passim*
49 USC § 10505(e)	16
49 USC § 10505(f)	4, *passim*
49 USC § 10521(a)	3,4
49 USC § 10901(a)	3,4
49 USC § 10921	3,4
49 USC § 10922(j)	20
49 USC § 10923(b)	20
Interstate Commerce Act, Part I	19
Revised Interstate Commerce Act, P.L. 95-473, 92 Stat. 1337 (1978)	19
Motor Carrier Act of 1980, P.L. No. 96-296, 94 Stat. 793	19,20,21
Miscellaneous	
Railroad Revitalization and Regulatory Reform Act of 1976, § 207, P.L. No. 94-210, 90 Stat. 31	18,19

Table of Authorities Continued

	Page
S. Conf. Rep. No. 94-595, Vol. 2, 1976 U.S. Code Cong. & Adm. News 167	19,21
Staggers Rail Act of 1980, § 213, P.L. No. 96-448, 95 Stat. 1985	19,21
126 Cong. Rec. 3634-35 (1980)	20
126 Cong. Rec. 7826 (1980)	20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, in No. 90-1008, *Central States Motor Freight Bureau, Inc., et al. v. Interstate Commerce Commission and United States*, dated February 1, 1991, reported at 924 F.2d 1099, and reprinted as *Appendix A*.

The Order of the United States Court of Appeals for the District of Columbia Circuit in No. 90-1008, filed March 28, 1991, denying the petition for rehearing of petitioners below, reprinted as *Appendix B*.

The decision of the Interstate Commerce Commission of November 27 (served December 15), 1989, in docket Ex Parte No. 230 (Sub No. 7), *Improvement Of TOFC/COFC Regulations (Pickup And Delivery)*, reported at 6 ICC 2d 208 (1989), reprinted as *Appendix C*.

JURISDICTION

The opinion and judgment of the District of Columbia Circuit was entered on February 1, 1991 (*Appendix A*). A timely petition for rehearing was denied on March 28, 1991 (*Appendix B*). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES

The text of the statutes cited below is set forth as *Appendix D*.

28 USC § 1254(1)	Courts of appeals; certiorari; appeal; certified questions
28 USC § 2321	Judicial review of Commission's orders and decisions; procedure generally; process
28 USC § 2342(5)	Jurisdiction of court of appeals
28 USC § 2343	Venue
49 USC § 12(1)(b) [repealed 10/17/78]	Authority and duties of Commission; witnesses; depositions
49 USC § 10501(a)	General jurisdiction

49 USC § 10505	Authority to exempt rail carrier transportation
49 USC § 10521(a)	General jurisdiction
49 USC § 10901(a)	Authorizing construction and operation of railroad lines
49 USC § 10921	Requirement for certificate, permit, or license

STATEMENT OF THE CASE

A. Decisions Of The Interstate Commerce Commission

The judgment of the District of Columbia Circuit (*Appendix A*) which is the subject of this petition denied a petition to review the third in a series of rulemaking decisions by the ICC. The ICC decisions exempted from economic regulation an expanding sphere of rail trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) movements and the truck transportation of the trailers and containers which occurs immediately before or immediately after the rail movements.[1]

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[1] In a typical TOFC or COFC movement, freight is loaded, usually at the shipper's plant, into a trailer (a motor van with permanently attached wheels) or a container (a box about the size of a trailer mounted on a wheeled chassis). Trailers are used for inland moves, containers when there is a prior or subsequent movement by water. Petitioners will use the word "trailer" to mean trailer or container, since, for the purpose of this petition, there are no relevant differences. See, *Interstate Commerce Comm'n v. Texas*, 479 US 450, 451 n.1 (1987). The loaded trailer is attached to a motor carrier tractor (the power unit), which pulls it over the road to a rail ramp. The trailer is detached from the tractor and rolled onto a railroad flatcar,

In the first of the three decisions, *Improvement Of TOFC/COFC Regulation*, Ex Parte No. 230 (Sub No. 5), reported at 364 ICC 391, 364 ICC 731 (1981), the ICC exempted all rail TOFC and COFC movements and those conjunctive motor carrier movements performed in trucks owned and operated by the rail carrier.[2] The ICC found its exemptive authority in Title 49 USC, § 10505(f),[3] which it noted "singles out TOFC/COFC service as a candidate for exemption." 364 ICC, at 393. The Fifth Circuit affirmed the ICC's Sub No. 5 decision, *American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981). The court held that § 10505(f) was not limited to rail transportation but applied by its explicit terms to "transportation that is provided by a rail carrier," including motor TOFC/COFC service in rail-owned and operated trucks. 656 F.2d, at 1120. The court looked also to subsection (a)

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which is moved over the rails to the destination rail ramp. The trailer is then rolled off the flatcar, attached to a motor carrier tractor, and pulled to the ultimate destination. See, generally, *Improvement Of TOFC/COFC Regulations (Rail Affiliated Motor Carrier And Other Motor Carriers)*, 3 ICC 2d 869 (1987).

[2] Prior to the first of these decisions in 1981, rail TOFC and COFC movements and the motor carriage of trailers and containers which occurred immediately before or immediately after the rail movements were subject to economic regulation by the ICC. 49 USC §§ 10501(a); 10521(a); 10901(a); and 10921. The sole exception prior to 1981 was rail TOFC and COFC movements of fresh fruits and vegetables, which had been exempted from economic regulation by the ICC in 1979. *Rail Exemption Authority—Fresh Fruits And Vegetables*, 361 ICC 374 (1979).

[3] "The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement."

of § 10505,[4] finding it to be "the source of the Commission's authority to grant exemptions . . . ." *Id.*

In the second decision, *Improvement Of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers And Other Motor Carriers)*, Ex Parte No. 230 (Sub No. 6), reported at 3 ICC 2d 869 (1987),[5] the ICC made a modest expansion of its exemption of motor carrier TOFC/COFC service to include those instances in which the motor carrier acts as the rail carrier's agent or the rail and motor carrier provide service under joint rates. The ICC held that where agency or joint rates exist the rail and motor carriers are "natural business partners," thus satisfying the "related to" requirement of § 10505(a). 3 ICC 2d, at 870-71. The ICC also looked to § 10505(f) as the source of its exemption authority because the motor carrier service was provided by the rail carrier as the motor

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[4] "In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power."

[5] The decision was the subject of a petition for review filed in the Eleventh Circuit by petitioners here, but withdrawn on petitioners' request, No. 87-8647, *Central & Southern Motor Freight Ass'n, Inc. v. United States and ICC.*

carrier's principal or as a joint-rate partner of the motor carrier. 3 ICC 2d, at 875.

In the third decision, *Improvement Of TOFC/COFC Regulations (Pickup And Delivery)*, Ex Parte No. 230 (Sub No. 7), reported at 6 ICC 2d 208 (1989) (*Appendix C*), the ICC extended its exemption of motor carrier TOFC/COFC service to truck movements which are independent of and not provided by the rail carrier.[6] While admitting that § 10505(f) did not grant it the necessary exemptive power because the motor carrier movements were not provided by the rail carrier, App. 39a, the ICC nonetheless concluded that this independent, non-rail-provided motor carriage was "a matter related to a rail carrier providing transportation" within the purview of § 10505(a) and thus a proper subject for the exercise of its exemptive authority.

B. Decisions Of The Court Of Appeals

On January 5, 1990, petitioners filed a petition for review of the ICC's Sub No. 7 decision with the United States Court of Appeals for the District of Columbia Circuit, No. 90-1008, *Central States Motor Freight Bureau, Inc., et al. v. United States and ICC.* Concurrently, petitioners asked the ICC to postpone

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[6] In these independent movements, the railroad providing the TOFC or COFC service and the motor carrier providing the prior or subsequent truck service are in a carrier-shipper relationship. Both rail and motor transportation is usually arranged by third-party intermediaries. The economic significance of the decision lies in the fact that it embraces "in excess of seventy-five percent of the TOFC/COFC shipments moved by the nation's railroads." Comments to the ICC of American Institute for Shippers' Associations, Inc., et al., at 12, reprinted as *Appendix E.*

the effective date of its Sub No. 7 decision, pending judicial review. By decision of January 12, 1990, the ICC denied the request, and the decision became effective January 17, 1990.

By decision issued February 1, 1991, in No. 90-1008, *Central States Motor Freight Bureau, Inc., et al. v. Interstate Commerce Commission and United States*, reported at 924 F.2d 1099 (*Appendix A*), a three-judge panel of the District of Columbia Circuit denied petitioners' petition for review, Judge Silberman dissenting. Applying the analysis mandated by this Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837 (1984), the Court of Appeals concluded that by the enactment of 49 USC § 10505(f) Congress had not unequivocally expressed its intention to limit economic deregulation of motor carriage under § 10505(a) to rail-provided TOFC and COFC service and that the ICC had put forth a permissible construction of § 10505. Petitioners' request for rehearing of the February 1, 1991, decision was denied by order filed March 28, 1991 (*Appendix B*).

BASIS OF FEDERAL JURISDICTION

The jurisdiction of the Court of Appeals was invoked pursuant to 28 USC §§ 2321 and 2342(5) which provides that courts of appeals have exclusive jurisdiction to review final orders of the ICC; and 28 USC § 2343, which provides that venue is in the judicial circuit in which the petitioner resides or has its principal office or in the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

A. The Majority Is Predisposed To Find That Congress Gave Broad Exemptive Authority To The ICC

The fundamental error in the decision of the Court of Appeals is that at the outset of its review of the ICC's Sub No. 7 decision and without having performed the Step I analysis mandated by *Chevron*, the Court accords deference to the ICC's interpretation of 49 USC § 10505, insofar as it is based on a permissible construction of the statute. App. 6a. The deference to the agency's construction called for by this Court should come only after the reviewing court has determined for itself that "the statute is silent or ambiguous with respect to the specific issue . . . ." 467 US, at 843.

The majority has narrowly and correctly defined the "precise question at issue" in this case as "whether Congress has 'directly' and 'unambiguously' expressed its intention regarding ICC deregulation of motor TOFC transportation that is not provided by a rail carrier." App. 12a. In § 10505(f) of Title 49, USC—the only portion of § 10505 to address TOFC and COFC traffic—Congress explicitly extended to the ICC authority to exempt intermodal movements from economic regulation and chose to limit that authority to transportation provided by a railroad. But before it examines this Congressional response to the "precise question at issue," the majority of the Court of Appeals has already agreed with the ICC that § 10505(a)—which makes no mention of intermodal movements—bestows upon the ICC the broad power to exempt all motor TOFC and COFC transportation, irrespective of whether the transportation is provided by the rail carrier. App. 7a-11a.

It is not surprising, then, that when the majority looks at § 10505(f), it is predisposed not to find in that section any limit to the reach of § 10505(a). Apparently, the majority would find a limitation only if § 10505(f) were worded as a prohibition. App. 13a-14a. Judge Silberman, in dissent, identifies the majority's error:

> By the time my colleagues get around to discussing what they agree is the main issue of the case—the interpretation of section (f)—it would appear that they are already convinced that subsection (a) is a positive grant of authority to do *all* that the Commission would like to do regarding intermodal transportation. Accordingly, subsection (f) is read with what seems to be a jaundiced eye that finds linguistic imprecision and ambiguity where it does not exist.

App. 27a-28a. (Emphasis in original).

Absent from the majority decision is the rigorous Step I analysis performed by this Court in *Chevron*. This Court first examined Congressional intent by analyzing the statutory language, 467 US, at 859-62; the legislative history, 467 US, at 862-64; and the policies behind the statute, 467 US, at 864-66. Only upon concluding that analysis did the Court conclude that it faced two distinct policy goals, one economic and the other environmental, and that Step II of *Chevron* had been reached. The point was re-emphasized by this Court in *Federal Reserve Board v. Dimension Financial Corp.*, 474 US 361 (1986), which, like the present case, involved an issue of whether the agency was empowered to make a particular reg-

ulatory change. The Court held that such a determination must begin with the language of the statute: "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." 474 US, at 368.

Justice Stevens, the author of *Chevron*, aptly explained the matter further in his dissent in *Young v. Community Nutrition Institute*, 476 US 974, 987 (1986):

> The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference. A statute is not "unclear unless we think there are decent arguments for each of the competing interpretations of it." Thus, to say that the statute is susceptible of two meanings, as does the Court, is not to say that either is acceptable.[7]

B. *Chevron* Has Been Unevenly Applied By The Circuits And Within This Circuit

The failure of the Court of Appeals majority to apply the rigorous analysis required by Step I furnishes an appropriate occasion for this Court to elaborate upon the standard of review where a court reviews agency rulemaking which has construed a sta-

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[7] See also Justice Marshall's dissent in *Chemical Manufacturer's Association v. Natural Resources Defense Council*, 470 US 116, 135 (1985), where he emphasized that in determining Congressional intent it is necessary to analyze the "language, history, structure and purpose" of a statute.

tutory grant of authority.[8] While *Chevron* has rightfully been hailed as a landmark decision and has been cited almost routinely, the results of its application, or non-application, by lower courts have been most uneven.

The differences were highlighted to some extent in a colloquium published in *Judicial Review Of Administrative Action In A Conservative Era*, 39 Adm. L. Rev. 353 (1987). Then Judge Starr stated:

> The reason that I am not pessimistic is that Step One, I believe, is a real test with real teeth and in fact can reasonably be argued to vindicate an appropriate judicial role . . . . It seems to me we're not going to see as much deference in cases going to the very heart, the core, of the agency's power, which was of course the case in *Dimension Financial*.[9]

Id., at 363. The difficulty in application of the *Chevron* two-step analysis did not go unnoticed in other articles.[10] Since 1987, the difficulty has not abated, as

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[8] This Court has furnished additional guidance to the lower courts in *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 US 421 (1987), where it held that the question as to whether Congress intended two standards in the immigration act to be identical was a pure question of law. *Chevron* was cited but distinguished. Likewise, this case requires reconciliation and review of two parts of the same statutory section.

[9] *Federal Reserve Board v. Dimension Fin. Corp.*, 474 US 361 (1986).

[10] See, e.g., Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations On The Controlling Effect Given Agency Statutory Constructions*, 1988 Az. L. Rev. 769; Nelson,

the instant case so clearly illustrates. Indeed, the disparities between the approaches adopted by different circuits, and even different panels within the same circuit, seems to have widened. For example, the deference to the agency's statutory construction shown throughout by the majority in the instant case contrasts sharply with the decision in *International Brotherhood Of Teamsters v. ICC*, 801 F.2d 1423 (DC Cir. 1986), where an opinion of the ICC was reversed after rigorous and non-deferential Step I analysis.[11] As does the instant case,*Teamsters* involved the distinctions between ICC power over motor carrier as opposed to rail matters. Most recently, in *Cajun Electric Power Cooperative, Inc. v. FERC*, 924 F.2d 1132 (DC Cir. 1991), Judge Silberman wrote:

> It is only after the first step of the *Chevron* analysis—when it is determined that legisla-

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The Chevron Deference Rule And Judicial Review of FERC Orders, 9 Energy L. J. 59; *Chevron And Cannons Of Statutory Construction*, 58 Geo. Wash. L. Rev., 829; Pierce, *Chevron And Its Aftermath: Judicial Review Of Agency Interpretations Of Statutory Provisions*, 41 Vanderbilt L. Rev. 301; note, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds The Confusion*, 73 Cornell L.Rev. 113.

[11] In 1987, Chief Judge Wald described the D.C. Circuit's approach to *Chevron* in a manner which seems inconsistent with the deferential stance of the majority in the instant case. Judge Wald stated: "[O]ur circuit initially took a fairly rigid approach to the case, deferring to agencies in a wide array of situations .... Today, however, our court is inching back towards a more balanced stance, allowing greater space for judicial legal interpretations and moving away from complete deference to the agency. *The Contribution of the D.C. Circuit to Administrative Law* (transcript of program presented at Section of Administrative Law Fall Meeting in October, 1987), 40 Adm. L. Rev. (No. 4) 507, 529-30 (1988).

> tion is ambiguous—that we examine an agency's interpretation under the deferential 'reasonable' standard .... We have always seen the first step as one conducted under *de novo* review.[12]

Undue deference of the majority in the instant case is similar to that of the Seventh Circuit in *Variamparambil v. I.N.S.*, 831 F.2d 1362, 1366 (7th Cir. 1987), where the court declared that the agency's interpretation of a statute "is of course entitled to deference."[13] At the other end of the spectrum, the Ninth Circuit declared that no deference is due to an agency interpretation which is inconsistent with the federal regulatory scheme, while *Chevron* was mentioned only in the dissent.[14] Similarly, the Tenth Circuit declared that an issue involving interpretation of the Federal Power Act raised a question of pure law, not requiring deferential review, *Public Service Co. v. FERC*, 832 F.2d 1201, 1225 (10th Cir. 1987). Somewhere in between is *United States v. Board Of Trustees For U. Of Alabama*, 908 F.2d 740 (9th Cir. 1990), where the court ruled that an agency's understanding of Congressional intent involves a "quintessential judicial function," in which the agency's opinion is simply "influential." 908 F.2d, at 747.

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[12] See also Judge Silberman's comments in a perceptive article, *Chevron—The Intersection Of Law And Policy*, 58 Geo. Wash. L. Rev. 821.

[13] Subsequently, the same court appears to compound the confusion by stating in *Zalega v. INS*, 916 F.2d 1257 (7th Cir. 1990), that it conducts review of INS statutory interpretations *de novo* but defers to the agency so long as it is reasonable.

[14] *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990).

With those preliminary observations concerning the approach to the task of judicial review, it is appropriate to turn now to examine the action of the Court of Appeals in affirming the ICC in this case.

C. The Majority Has Failed to Conduct Proper Analysis Under Step I Of Chevron

1. The Plain Meaning Of § 10505

The majority erred in its application of the two-step analysis set out by this Court in *Chevron*. Under Step I, the reviewing court must decide if Congress spoke to "the precise question at issue." If so, both the court and the agency must give effect to Congress' intent:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 US, at 842-43. If, and only if, the court determines that the intent of Congress is not clear, the court proceeds to Step II to decide "whether the agency's answer is based on a permissible construction of the statute," 467 US, at 843. The majority fails to find that Congress has spoken to the precise issue in this case because it has looked not at the intent of Congress but at the ICC's interpretation of that intent:

> Under "*Chevron* Step I," a court is entitled to supplant an agency's interpretation only where Congress clearly intended another interpretation, in the precise circumstances that the agency's action presents.

App. 12a. The majority has misread the directive of this Court. The question of supplanting an agency

interpretation does not arise under *Chevron* Step I, but only under Step II if the reviewing court has satisfied itself that Congress did not clearly and unambiguously express itself:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 US, at 843.

The majority's unwarranted deference in its Step I analysis to the ICC's view of Congressional intent has led it to read § 10505(a) in isolation from § 10505(f). This reading reduces § 10505(f), the only part of § 10505 which addresses intermodal movements, to a mere suggestion by Congress of an appropriate candidate for exemption.[15] No effort to

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[15] The Court looks for support to the decision of the Fifth Circuit in *ATA v. ICC*, *supra*. While finding the source of the ICC's exemptive powers in § 10505(a), the Fifth Circuit was careful throughout its opinion to read § 10505(a) and § 10505(f) together. In construing § 10505(a), the Court found only that motor carrier TOFC and COFC service in rail-owned and operated trucks was a matter sufficiently related to a rail carrier providing transportation to satisfy the section, calling the issue of even that obviously rail-provided service a difficult one, 656 F.2d, at 1120. There is nothing in the opinion of the Fifth Circuit to support the contention, either that independent truck movements fall within § 10505(a) or that the section reaches beyond rail-provided service.

harmonize the subsections is attempted. Such treatment offends the well-settled canon of statutory construction that all parts of a statute, if at all possible, are to be given effect. *Weinberger v. Hynson, Westcott & Dunning*, 412 US 609, 633 (1973).

The majority rejects any limiting effect of § 10505(f) because Congress did not word the section as the majority would have wished:

> The Commission may not exempt intermodal transportation except when provided by a rail carrier,
>
> or
>
> The Commission may not exercise its authority to exempt intermodal transportation other than that provided by a rail carrier.

App. 14a.[16] The majority has overreached itself. A finding of Congressional intent under *Chevron* Step I should not involve playing with Congress' wording:

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[16] The majority supports its holding that only an express "thou shalt not" would be adequate to limit the Commission's exemptive power by reference to § 10505(e), which provides, inter alia:

> No exemption order issued pursuant to this section shall operate to relieve *any rail carrier* from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title.

(Emphasis added.) However, this argument demonstrates the fallacy of the interpretation adopted by the majority under which the ICC may not by an order exempt rail carriers from their liability under the Carmack Amendment. By exercising such authority over independent transportation provided by a motor carrier, it may now excuse motor carriers from such liability, for the prohibition does not apply to motor carriers.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation .... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.

467 US, at 843-44.[17] Subsection (f) contains neither an explicit gap nor an implicit delegation. If Congress wished to allow the ICC to deregulate non-rail-provided motor carrier TOFC movements, it would have done so, but it did not.[18]

Furthermore, subsection 10505(a), even taken in isolation, makes no sense when applied to independent transportation provided by a motor carrier, for it authorizes the ICC to grant an exemption when the application of a provision of the subtitle "is not necessary to carry out the transportation policy of section 10101a of this title." Section 10101a is the National Rail Transportation Policy, and one cannot apply that policy to independent motor carrier transportation. As a result, there are simply no criteria for the ICC to apply in making its exemption determination.

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[17] The majority's search for alternative wording appears to result from its effort to square the statute with the ICC's reading of it, rather than looking to see what Congress meant: "Thus, as a matter of textual exegesis, the Commission's interpretation is not implausible." App. 14a.

[18] Judge Silberman criticizes the majority's conclusion that Congress was silent as to truck transportation not provided by the rail carrier, calling it a violation of the principle of *expressio unius est exclusio alterius*. App. 28a-29a.

The majority's analytical error is succinctly identified by Judge Silberman in dissent. He notes that if only § 10505(a) came into play, the majority would be correct both in finding no clear Congressional attempt to limit exemption of motor carriage to rail-provided movements and in moving on to Step II of the *Chevron* analysis. App. 25a-26a. But he continues:

> Inconvenient though it may be, the very same section of the Act includes another subsection which squarely deals with the subject of *intermodal* deregulation . . . .

App. 26a. (Emphasis in original). He points out that there is no ambiguity in § 10505(f), the only part of § 10505 to address intermodal carriage. Rather than attempting to harmonize (a) and (f), the majority, Judge Silberman notes, suggests a tension between them, an action he calls "naked analytical bootstrapping." App. 28a. Judge Silberman concludes that the majority would have us believe Congress did not mean what it said in § 10505(f), "that it does not 'limit' the Commission's power to deregulate trucking rates to those circumstances where the railroads are providing the motor carriage as part of a continuous movement." App. 27a.

Had the majority adhered to Step I of *Chevron*, the plain meaning of § 10505 would be clear.

2. The Legislative History Of § 10505

The legislative history of § 10505 supports the contention of petitioners that Congress intended to limit its scope in TOFC/COFC matters to rail service and rail-provided truck service. Three pieces of legislation are relevant: (1) § 207 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), P.L.

No. 94-210, 90 Stat. 31, which added § 12(1)(b) to the Interstate Commerce Act, 49 USC § 12(1)(b), which in turn became § 10505(a);[19] (2) the Motor Carrier Act of 1980 ("MCA-1980"), P.L. No. 96-296, 94 Stat. 793 ("MCA"); and (3) § 213 of the Staggers Rail Act of 1980, P.L. No. 96-448, 95 Stat. 1895, which added subsection (f) to 49 USC § 10505.

The relevant language of § 10505(a), "In a matter related to a rail carrier providing transportation . . ." conferred authority upon the Commission to exempt persons or services from the provisions of Part I of the Interstate Commerce Act, which pertains only to railroads, not motor carriers, and cannot be read to include the non-rail-provided motor carriage at issue here. This clear reading of § 10505(a) was addressed specifically in the Conference Report on the 4-R Act, which noted that the language was inserted as a Conference Substitute, limiting the application of the section to Part I of the Interstate Commerce Act (which applied to railroads only) because of the jurisdictional objections of the House Committee on Public Works and Transportation, which has jurisdiction over motor carrier matters.[20] There is nothing in the history of

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[19] Section 12(1)(b) became § 10505(a) of Title 49 pursuant to the Revised Interstate Commerce Act, Pub. L. 95-473, 92 Stat. 1337, 1361 (1978), which codified and enacted the Interstate Commerce Act without substantive change. The Revised Act repealed § 12(1)(b), 92 Stat. 1466, 1470, realigned and renumbered it as § 10505(a) and, without comment, changed the "related to" language to its present form. Section 12(1)(b) read, as pertinent, "In a matter relating to a common carrier by railroad subject to this chapter . . . ."

[20] S. Conf. Rep. No. 94-595, Vol. 2, 1976 U.S. Code Cong. & Adm. News 167, 168.

§ 10505(a) to suggest Congress intended it to reach beyond rail matters to the independent motor carriage involved here.

The limitation of § 10505(a) to rail matters is reinforced by the fact that in passing MCA-1980, which dealt with the deregulation of motor carriage, Congress rejected an amendment which would have exempted *all* motor carrier service incidental to rail TOFC or COFC service, including the non-rail-provided motor transportation at issue here.[21]

The majority opines that Congress' refusal during the MCA-1980 debate to deregulate motor TOFC and COFC service does not mean Congress did not want the ICC to take the same step later. On the contrary, the debate shows that Congress reserved to itself, not the ICC, the right to revisit the matter.[22]

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[21] 126 Cong. Rec. 3634-35 (1980). Instead, in MCA-1980 Congress chose to *ease* regulation of motor carriage performed in conjunction with rail TOFC and COFC service: in § 25(a) by enacting § 10322(b)(2) of Title 49, USC, which mandates expedited processing by the ICC of applications for authority to provide motor carrier transportation incidental to TOFC and COFC rail service; and in §§ 34(a) and 34(b) by enacting §§ 10922(j) and 10923(b), which authorize a motor common carrier and motor contract carrier, respectively, to receive from or deliver to a rail carrier at any point on the rail route a trailer moving in TOFC or COFC service.

[22] 126 Cong. Rec. 7826 (1980) (remarks of Sen. Cannon):

> ". . . the record is not sufficient for *the Senate* to make a final judgment . . . . I suspect that when *the committee* has a chance to look at this [deregulatory] provision that *it* may find it to be highly meritorious. But I do think *we* need more time and more testimony

It is anomalous to suggest that a few months later, when passing the Staggers Act, which is rail legislation, Congress gave the ICC the very power to deregulate motor carriage which it rejected during debate on MCA-1980. Rather, Congress was telling the ICC that, by virtue of subsection (f), it *now* had authority to do something it could *not* do under the broad rail exemption provisions of § 10505(a): exempt all modes of transportation provided by a railroad as part of a continuous intermodal movement.[23]

CONCLUSION

The majority of the Court of Appeals has erred in failing to discern the clear intention of Congress to limit the exemption power under 49 USC § 10505 to

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before *we* dive into the matter."

(Emphasis added.) Of course, in over 10 years, Congress has not changed the legislation.

[23] For support of its conclusion that § 10505(f) does not limit the broad reach of § 10505(a), App. 12a, the majority looks to the remarks in support of intermodal growth by Congressman Ertel on the floor of the House of Representatives when introducing the amendment to the Staggers Act which became § 10505(f). The majority concludes: "Nothing in his advocacy for the amendment suggested that it was intended to limit the ICC's § 10505(a) authority in any way." App. 17a. The delimiting effect of § 10505(f) on § 10505(a) can be found in the very statutory language chosen by Congressman Ertel. Can it be suggested plausibly that the Congressman and his colleagues enacted § 10505(f) simply to be sure the ICC knew it already had authority under § 10505(a) to deregulate rail-provided motor TOFC and COFC service? Such a reading cannot be squared with reasonable statutory construction. Rather, it is clear the Congressman wanted to make available for the ICC's permissive deregulation a specific area of rail-provided truck service which was *not* covered by § 10505(a).

transportation provided by a rail carrier. The failure is occasioned by the Court's misapplication of the *Chevron* criteria. The issue is precisely addressed by Congress in § 10505(f). There is neither silence nor ambiguity. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 26, 1991

APPENDIX

APPENDIX A

CENTRAL STATES MOTOR FREIGHT BUREAU, INC., et al.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and United States of America,

Respondents,

Association of American Railroads, et al.,

Intervenors.

No. 90-1008.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 19, 1990

Decided Feb. 1, 1991.

Rehearing and Rehearing En Banc Denied March 28, 1991.

Interstate Commerce Commission issued order deregulating motor carrier activities incidental to providing of "piggyback" services. Appeal was taken. The Court of Appeals, Ruth Bader Ginsburg, Circuit Judge, held that Commission had statutory authority to deregulate.

Affirmed.

Silberman, Circuit Judge, dissented and filed opinion.

Petition for Review of an Order of the Interstate Commerce Commission.

J. Elliott Bunce, with whom John W. McFadden, Jr., Arlington, Va., Bryce Rea, Jr., William E. Kenworthy and Kevin M. Williams, Washington, D.C., were on the brief, for petitioners.

Louis Mackall, Atty., I.C.C., with whom Robert S. Burk, Gen. Counsel, and Craig M. Keats, Deputy Associate Gen. Counsel, I.C.C., James F. Rill, Asst. Atty. Gen., Robert B. Nicholson and John P. Fonte, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

Frederic L. Wood and Nicholas J. DiMichael, Washington, D.C., for The Nat. Indus. Transp. League, John C. Fudesco for Pennsylvania Truck Lines, Inc., Ronald N. Cobert and Andrew M. Danas, Washington, D.C., for Intermodal Marketing Ass'n, Robert W. Blanchette and John B. Norton, Washington, D.C., for Ass'n of American Railroads were on the joint brief for intervenors. J. Thomas Tidd, Washington, D.C., for American Ass'n of Railroads, Robert L. Cope and Joseph Michael Roberts for Intermodal Marketing Association, and Richard D. Fortin, Washington, D.C., for Nat. Indus. Transp. also entered appearances for intervenors.

Before: RUTH BADER GINSBURG, SILBERMAN and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge RUTH BADER GINSBURG

Dissenting Opinion filed by Circuit Judge SILBERMAN.

RUTH BADER GINSBURG, Circuit Judge:

In "trailer-on-flat car" ("TOFC") or "piggyback" operations, trailers containing freight are pulled by motor

carrier from the shipper to the rail ramp, moved by rail to the destination rail ramp, and then taken to their ultimate destination by motor carrier. "Container-on-flat-car" ("COFC") operations are similar, differing only in that at least one leg of the journey is by water. Two previous rulemakings by the Interstate Commerce Commission ("ICC" or "Commission") exempted from economic regulation all TOFC/COFC rail service and some types of TOFC/COFC motor operations. In this appeal, petitioner rate bureaus and motor carrier associations (collectively, "Central States") challenge the most recent ICC rulemaking on TOFC/COFC service, which exempts from economic regulation virtually all remaining motor pickup and delivery service.[1] *See Inprovement of TOFC/COFC Regulations (Pickup and Delivery), Ex Parte No. 230 (Sub-No. 7)*, 6 I.C.C.2d 208 (1989) ("Sub-No. 7"). We hold that the ICC's construction of the relevant statutory provisions is permissible and accordingly deny Central States' petition for review.

I.

The ICC's current exemption authority stems from section 207 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub.L. No. 94-210, 90 Stat. 31 (codified at 49 U.S.C. § 12(1)(b) (1976)) (recodified at

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[1] The exception is so-called "Plan I" service, which the ICC has characterized as

> [r]ailroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the motor carrier. Traffic moves under rates in regular motor carrier tariffs, and the railroad's compensation is arrived at by negotiation between the two carriers.

American Trucking Ass'ns v. Atchison, T. & S.F. Ry., 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967) (quoting Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback), 322 I.C.C. 301, 304 (1964)).

49 U.S.C. § 10505(a) (Supp. III 1979)).[2] This provision of the 4-R Act authorized the Commission to issue an exemption from economic regulation only in matters of "limited scope." Furthermore, before it could exempt matters even of limited scope, the Commission had to determine that regulation was unnecessary to further the national transportation policy, placed an unreasonable burden on a person, class of persons, or commerce, and served "little or no useful public purpose." These restrictions upon the Commission's exemption authority prevented any broad deregulatory reforms.[3]

The Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895, eased the exemption requirements of section 10505(a). That section now provides:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Inter-

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[2] As provided in the Revised Interstate Commerce Act, Pub.L. No. 95-473, 92 Stat. 1337 (1978) (codified at 49 U.S.C. § 10505 (Supp. III 1979)):

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service because of the limited scope of the transaction or service, when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the [national] transportation policy . . . ;
>
> (2) would be an unreasonable burden on a person, class of persons, or interstate and foreign commerce; and
>
> (3) would serve little or no useful public purpose.

The effect of the Revised Interstate Commerce Act on the 4-R Act was simply to renumber the sections of the 4-R Act and to make technical changes in its wording.

[3] The Commission did exempt railroad shipment of fresh produce from rate regulation. *See* Rail General Authority—Fresh Fruits and Vegetables, 361 I.C.C. 374 (1979).

> state Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) *either* (A) the transaction or service is of limited scope, *or* (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (emphasis added). While the Staggers Act retained the "limited scope" criterion, the word "or" in section 10505(a)(2) has made such a finding no longer mandatory. The Commission's focus in exemption cases has shifted to the second criterion—the potential for abuses of market power.

Not surprisingly, the ICC has responded to the relaxed statutory criteria by exercising its exemption power more actively. In 1981, it exempted the rail portion of TOFC/COFC transportation, as well as the motor carrier portions when accomplished in trucks owned or leased by the railroad. *See Improvement of TOFC/COFC Regulation, Ex Parte No. 230 (Sub-No. 5)*, 364 I.C.C. 731 (1981) *("Sub-No. 5"), aff'd sub nom. American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir.1981). The Commission extended this exemption in 1987 to cover TOFC/COFC operations performed by a motor carrier either as the agent or as the joint-rate partner of the railroad. *See Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Carriers), Ex Parte No. 230 (Sub-No. 6)*, 3 I.C.C.2d 869 (1987) *("Sub-No. 6")*.

In this appeal, Central States argues that the Commission has exercised its power *too* actively. The remaining motor pickup and delivery service that the Commission

exempted in *Sub-No. 7*, according to Central States, is not "related to a rail carrier providing transportation." Central States also maintains that the exemption is inconsistent with the legislative history and various provisions of the Motor Carrier Act of 1980, Pub.L. No. 96-296, 94 Stat. 793. Central States' most serious challenge concerns section 10505(f), a provision added by the Staggers Act:

> (f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

According to Central States, this provision limits the Commission's exemption authority in matters intermodal to transportation "provided by a rail carrier." Thus, Central States concludes, the ICC had no statutory authority to deregulate motor freight TOFC/COFC operations that are not "provided by a rail carrier."[4]

II.

In considering Central States' various challenges, we accord the Commission deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and uphold its decision so far as it is based on a permissible construction of the relevant statutory provisions. *See id.* at 843, 104 S.Ct. at 2781. In so doing, we reject Central States' arguments that deference is inappropriate because section 10505 is "jurisdictional," and that a reviewing court need not defer to agencies on "purely legal questions."[5]

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[4] Central States does not dispute the Commission's findings, pursuant to § 10505(a), that economic regulation is not necessary to carry out the rail transportation policy of § 10101(a) or to protect shippers from the abuse of market power.

[5] We also reject Central States' more particular argument against *Chevron* deference to the Commission's interpretation of the relation between sections 10505(a) and (f). *See infra* Part IV.

Central States is correct that courts, on occasion, have resisted assigning heavy weight to an agency's interpretation of a statute typed "jurisdictional." The matter, however, remains "unsettled in this circuit." *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1288 (D.C.Cir.1990); *see also Business Roundtable v. SEC*, 905 F.2d 406, 408 (D.C.Cir.1990) (noting substantial authority on both sides of the question). We leave this issue untouched in this opinion, for we do not regard section 10505 as "jurisdictional" for *Chevron* purposes. Exercise of the ICC's section 10505 exemption authority neither lodges nor dislodges agency jurisdiction; instead, it *presupposes* ICC jurisdiction over the persons or services exempted.

Nor can we accept Central States' argument that we need not and ought not accord respect to the Commission's resolution of "purely legal" issues. The decision Central States deems controlling, *Regular Common Carrier Conference v. United States*, 820 F.2d 1323 (D.C.Cir.1987), held only that a reviewing court need not defer to an agency's interpretation of a purely legal issue where it is "inconsistent with congressional intent clearly expressed in the language and structure of the statute." *Id.* at 1330. For reasons expressed below, we think that circumstance does not obtain here.

III.

We have little difficulty in affirming the Commission's determination that the pickup and delivery services at issue are "related to a rail carrier providing transportation" within the meaning of section 10505(a). *See supra* p. 1101. The very point of the motor carrier pickup and delivery services at issue is to allow shippers to take advantage of the efficiencies that rail TOFC/COFC offers. *See Sub-No. 7*, 6 I.C.C.2d at 213; *see also American Trucking Ass'ns*, 387 U.S. at 420, 87 S.Ct. at 1620 ("TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transporta-

tion.") (quoting *Piggyback*, 322 I.C.C. at 329); 44 Fed.Reg. at 49279 (Aug. 22, 1979) (advance notice of proposed rules in *Sub-No. 5*, referring to the cost, energy, safety, and ecological benefits of rail transportation). The Commission has exempted motor carrier pickup and delivery from regulation only where it is performed immediately before or after a TOFC/COFC movement by rail, and where the rail and motor carrier legs are linked by an equipment interchange agreement.[6] *See Sub-No. 7*, 6 I.C.C.2d at 213-14. The Commission reasonably concluded that the exempted motor carrier operations are closely related to TOFC/COFC rail transportation, even though the rail and motor carrier segments are contracted for and billed separately.

Central States argues further that the Commission's interpretation of section 10505 is inconsistent with the Motor Carrier Act of 1980 ("MCA") in two respects. First, Central States observes, during floor debate over the MCA, the Senate deleted a committee amendment that, like the ICC exemption at issue, would have deregulated trucking and that was incidental to rail freight transportation. *See* 126 CONG.REC. 7825-27 (1980). The Commission, Central States argues, therefore could not rely upon the Staggers Act—a statute governing railroads, enacted in the same year as the MCA—to deregulate the same sphere of commerce that Congress specifically refused to deregulate in the MCA.

We do not find this argument persuasive. The fact that Congress declined to provide for immediate deregulation of incidental-to-rail trucking does not indicate that Congress meant to withhold from the ICC permission under the Staggers Act to do so after ten years of experience

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[6] The Commission describes an equipment interchange agreement as "a contract authorizing the transfer of equipment between two carriers. It is used to protect the owner's interest in the equipment. . . . The existence of such an agreement . . . ensures continuity of service between the modes." Joint Brief of Respondents at 9 n. 17.

with progressive deregulation of intermodal operations. Indeed, the legislative history of the Staggers Act indicates that Congress considered the ICC better-placed to make eventual decisions concerning the sectors of transportation fit for deregulation. *See* H.REP. No. 1430, 96th Cong., 2d Sess. 105 (1980) (conference report).

The legislative history of the MCA offers support for this view. Senator Cannon, a floor manager of the MCA, argued against immediate deregulation because, in his words, "the record is not sufficient for the Senate to make a final judgment." Senator Cannon continued: "I suspect that when the committee has a change to look at this [deregulatory] provision that it may find it to be highly meritorious. But I do think we need more time and more testimony before we drive into this matter." 126 CONG.REC. 7826 (1980). Moreover, Senator Cannon urged that since the rail portions of intermodal service had not yet been deregulated, the proposed trucking deregulation provision would leave piggyback transportation half-regulated and half-deregulated.[7] *Id.* Senator Hollings echoed this concern, and added that, in his judgment, the provision would go beyond incidental-to-rail trucking to deregulate shipments of dangerous commodities. *Id.* at 7827.

In short, the Senate seems to have rejected immediate deregulation in the MCA not because it considered deregulation of incidental-to-rail trucking bad policy, but because it believed that the issue had not been sufficiently studied, that the Senate was not well-placed to make the decision, and that incidental-to-rail trucking should not be deregulated while rail service was still regulated. TOFC/COFC rail service has now been deregulated, and the ICC has had a decade of experience with TOFC/COFC deregulation. As the ICC points out, Central States' interpre-

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[7] At this point, the Staggers Act had not been passed, and the Commission had not exercised its narrow exemption authority under the 4-R Act. *See supra* pp. 1100-1101 & note 2.

tation of section 10505 would leave rail TOFC/COFC deregulated and motor carrier pickup and delivery still substantially regulated; this interpretation would create a "mirror image" of the half-regulated, half-deregulated system against which Senators Cannon and Hollings counseled. The Senate debate over the MCA thus appears to us to bolster, rather than to weaken, the ICC's interpretation of section 10505.

Central States argues that the Commission's exemption will "moot" or "nullify" provisions of the MCA that liberalized TOFC motor carrier licensing procedures. *See* 49 U.S.C. §§ 10322(b)(2), 10922(k), 10923(b). We are not persuaded that the ICC's exercise of its exemption authority genuinely conflicts with these provisions. Section 10322(b)(2) requires the ICC to rule within 180 days on applications to provide motor service incidental to TOFC/COFC operations. The effect of the Commission's order is simply to make such applications unnecessary, unless the Commission revokes its exemption under section 10505(d), and except as to "Plan I" service, which the Commission's order did not deregulate (*see supra* note 1). The Commission could reasonably interpret section 10322(b)(2)—which was enacted before the Staggers Act broadened section 10505(a) to permit large-scale exemptions—as applicable only so far as the Commission's exemption authority lies dormant.

Similarly, we do not read sections 10922(k) and 10923(b) to conflict with the Commission's exemption order. Under sections 10922(k) and 10923(b), any motor carrier that is "authorized to serve the origin and destination points" of a TOFC/COFC route may pick up or deliver trailers at any point on that route. One effect of the ICC's deregulation order is to authorize all motor carriers to serve the origin and destination points of any TOFC/COFC route (except as regards Plan I service). Sections 10922(k) and 10923(b) would then authorize such carriers to pick up and

deliver at any point on a TOFC/COFC route. This coincides precisely with the Commission's deregulation order.

IV.

Central States' most substantial argument concerns the structural relation between sections 10505(a) and 10505(f). Section 10505(a), it contends, is merely the general source of the ICC's exemption authority over the railroads. Section 10505(f), by contrast, refers to piggyback operations specifically, providing that

> [t]he Commission may exercise its authority under this section to exempt transportation that is *provided by a rail carrier* as part of a continuous intermodal movement.

49 U.S.C. § 10505(f) (emphasis added). Central States argues that subsections (a) and (f), taken together, indicate that Congress specifically intended to authorize the ICC to exempt only the fraction of TOFC motor transportation that is "provided by a rail carrier." Thus, according to Central States, the "plain meaning" of subsections (a) and (f) bars the Commission from exempting TOFC motor traffic that, as in the case before us, is not provided by a rail carrier.

The standard against which we evaluate this argument is stated in *Chevron*, 467 U.S. at 842-45, 104 S.Ct. at 2781-83. In the first step of *Chevron* analysis, a reviewing court must determine, using "traditional tools of statutory construction," *id.* at 843 n. 9, 104 S.Ct. at 2782 n.9, whether Congress has "directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. at 2781. If Congress "had an intention on the precise question at issue," *id.* at 843 n. 9, 104 S.Ct. at 2782 n. 9, then "the court . . . must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. at 2781-82.

The Supreme Court indicated in *Chevron* itself that it meant the term "precise question at issue" to be interpreted tightly. In that case, the Court reviewed an EPA regulation that interpreted the statutory term "stationary source" to refer to all pollution-emitting devices at a single plant, as if they were encased in a single "bubble." The Court did not focus on whether Congress had expressed any intention regarding the meaning of the general statutory term, "stationary source." Rather, it considered, more pointedly, whether "Congress . . . actually ha[d] an intent regarding the *applicability of the bubble concept* to the [statutory] program." 467 U.S. at 845, 104 S.Ct. at 2783 (emphasis added). By narrowing the question at issue, the Court reduced the opportunities for a reviewing court to substitute its own interpretation for that of the agency. Under "*Chevron* Step I," a court is entitled to supplant an agency's interpretation only where Congress clearly intended another interpretation, in the precise circumstances that the agency's action presents. Here, the "precise question at issue" is whether Congress has "directly" and "unambiguously" expressed its intention regarding ICC deregulation of motor TOFC transportation that is not provided by a rail carrier. We think that it has not.

Nowhere in section 10505 did Congress explicitly address motor TOFC transportation not provided by a rail carrier; the terms of subsection (f) provide only that the Commission *may* deregulate TOFC transportation that *is* provided by a rail carrier. Nor do we agree with Central States that subsection (a) and (f), taken together, unambiguously support its position. We have already recognized that subsections (a) bestows broad exemption powers upon the ICC in matters "related to a rail carrier providing transportation," and that the scope of subsection (a) includes independently arranged TOFC motor traffic. *See supra* pp. 1102-1103. While subsection (f)'s specification of intermodal transportation provided by a rail carrier might, as Central States argues, be interpreted to limit this oth-

erwise broad authority by implication, the permissive wording of subsection (f) bears an alternative interpretation: Congress might have intended simply to identify continuous intermodal movement provided by a rail carrier as a particularly appropriate candidate for exemption under section 10505(a). Indeed, the Fifth Circuit has interpreted the relation of subsections (a) and (f) in just this way. *See American Trucking Ass'ns*, 656 F.2d at 1120-21 ("[T]he source of the Commission's authority to grant exemptions is found in section 10505(a) and not in section 10505(f), which simply singles out continuous intermodal movement as an appropriate candidate for the exercise of the Commission's section 10505(a) exemption authority.").

This interpretation is supported by a comparison between the form of subsection (f) and that of subsections (e) and (g). Subsections (e) and (g)—unlike subsection (f)—explicitly limit the Commission's subsection (a) exemption authority by expressly prohibiting certain kinds of exemption orders. Subsection (e) provides:

> No *exemption order* issued pursuant to this section *shall operate* to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. *Nothing in this subsection* or section 11707 of this title *shall prevent* rail carriers from offering alternative terms *nor give the Commission the authority to require* any specific level of rates or services based upon the provisions of section 11707 of this title.

49 U.S.C. § 10505(e) (emphasis added). Subsection (g) is structurally parallel:

> *The Commission may not exercise its authority under this section* (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

49 U.S.C. § 10505(g) (emphasis added). Congress could similarly have expressed subsection (f) as an unambiguous limitation on the Commission's subsection (a) authority, by providing, for example, that "The Commission may not exempt intermodal transportation except when provided by a rail carrier," or that "The Commission may not exercise its authority to exempt intermodal transportation other than that provided by a rail carrier." Congress, however, did not do so. Instead, it chose a grammatical form compatible with the interpretation that the Commission defends—the interpretation that subsection (f) is entirely permissive, *i.e.*, that it simply invites the Commission to exempt TOFC transportation provided by a rail carrier without preventing it from exempting other kinds of TOFC traffic that satisfy the criteria of subsection (a). Thus, as a matter of textual exegesis, the Commission's interpretation is not implausible. The text of section 10505(f), in sum, does not unambiguously support Central States' contrary position.

Furthermore, this court has made clear that "[t]he 'traditional tools of statutory construction' include not only the words of the statute, but also its relevant legislative history." *Local Union 1261 v. Federal Mine Safety Comm'n*, 917 F.2d 42, 46 (D.C.Cir.1990) (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2781 n. 9). Far from establishing that Central States' position is unambiguously correct, we think that the legislative history of section 10505 strongly supports the Commission's view that Congress did not intend to bar the Commission from exempting TOFC transportation not provided by a rail carrier. *See infra* Part V.

Accordingly, we review the Commission's decision under the second step of *Chevron* analysis. "The question for the court," then, "is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. For the reasons set out below, we conclude that the ICC's decision meets this standard.

V.

The bill that became the Staggers Act passed the Senate on April 1, 1980. While section 10505(a) was virtually identical to the version that became law,[8] the Senate bill contained no provision equivalent to present subsection (f). *See* 126 CONG.REC. 7301 (1980). Nor did the bill that emerged from the House committee in mid-May contain such a provision. *See* H.R.REP. No. 1035, 96th Cong., 2d Sess. 8-9 (1980). The House committee report explained that the bill as it then stood "clarifies and broadens the Commission's existing exemption authority under Section 20[7] (49 U.S.C. [§] 10505) of the 4R Act." *Id.* at 60.[9] Noting that the committee had "followed the Commission's exemptions closely," the report complained of the ICC's "considerable initial delay" in exercising its exemption authority under the 4-R Act, but expressed approval of the exemptions the Commission had thus far issued. The report referred in this connection to the ICC's advance notice of proposed rulemaking ("ANPR") in *Sub-No. 5*, the first TOFC/COFC exemption proceeding. The ANPR stated

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[8] The only substantive difference was a proviso appended to the subsection, to the effect that "the Commission may not issue any exemption which will substantially lessen competition and coordination between water and rail carriers." 126 CONG.REC. 7301 (1980).

[9] Central States argues in its opening brief that subsection (f) broadened the ICC exemption authority, citing the language quoted in the text. It similarly claims in its reply brief that subsection (f), not subsection (a), broadened the relevant exemption authority. Central States implies that section 10505(a) therefore would not by itself permit the Commission to issue any exemptions concerning intermodal service; the permissible scope of such exemptions, according to Central States, is determined by subsection (f) alone.

The only support Central States invokes for its claim that the ICC's exemption authority was broadened by subsection (f), not subsection (a), is the language of the House report just quoted. We have just seen, however, that when this report was written, subsection (f) had not yet been added to the bill. The language in this report therefore offers no support for Central States' position.

that the purpose of the proposed rulemaking was "to determine whether some form of exemption for the rail portion of TOFC service is a feasible method of accomplishing our purpose of encouraging this intermodal service." 44 Fed.Reg. 49279, 49280 (proposed Aug. 22, 1979). The ANPR's summary of the five issues on which the Commission proposed to promulgate rules placed this issue first on the list. *See id.* at 49279.[10]

The legislative history of subsection (f) strongly suggests that it was intended to affirm the Commission's 10505(a) authority to issue the proposed rule mentioned in the ANPR for *Sub-No. 5*, not to bar the Commission from further deregulating TOFC traffic. The provision now codified as section 10505(f) was introduced as a floor amendment, sponsored by Representative Ertel of Pennsylvania. The only substantial discussion of the amendment was Ertel's short speech on its behalf. That speech is instructive. Ertel began by extolling the virtues of intermodal freight transportation: greater use of TOFC/COFC service, he said, would conserve fuel, reduce highway maintenance and railway operating costs, increase productivity, and help maintain American competitiveness in the world economy. *See* 126 CONG.REC. 19397 (1981). TOFC/COFC service, however, was in his view "woefully underutilitzed." *Id.* One important reason that it was underutilized, Ertel argued,

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[10] Two of the other four proposals concerned relaxation of licensing requirements for TOFC motor service. These proposals were incorporated in the MCA, *see supra* pp. 1103-1104. Another proposal was to establish a "zone of reasonableness" for motor TOFC/COFC rates. The MCA included such a provision at 49 U.S.C. § 10708(d). The final proposal concerned "Plan I" TOFC service, *see supra* note 1. The Commission has not yet deregulated this service.

Although the "general proposals" section requested public comment on the possibility of exempting the motor carrier portion of TOFC/COFC, and expressed doubt as to whether the Commission had authority to do so, the ANPR did not identify motor carrier exemption as a subject of the proposed rulemaking. *See infra* p. 1108.

was that "the regulatory structure has inhibited intermodal growth by isolating modes from one another." *Id.* at 19397-98. Each mode was walled off from the others within its own peculiar regulatory structure; "in many cases," Ertel contended, "the cost of compliance" with these various regulatory regimes "is simply too high." *Id.* at 19398.

Consistent with these prefatory remarks, Ertel described his amendment as a call for the ICC to begin breaking down the regulatory barriers he had identified: "By *explicitly* giving the ICC the authority to eliminate some of this redtape," Ertel said, "my amendment is a *first step* toward a coherent nat[ion]al transportation system." *Id.* (emphasis added). Nothing in his advocacy for the amendment suggested that it was intended to limit the ICC's section 10505(a) authority in any way. The floor manager and minority spokesperson endorsed the amendment as "helpful," and the House adopted it by voice vote.

The conference committee adopted the Ertel amendment as section 10505(f). The conference report contained a section-by-section analysis of each difference between the House, Senate, and conference versions of the bill, "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes." H.REP. No. 1430, 96th Cong., 2d Sess. 79 (1980). In its analysis of the House version of section 10505, however, the conference report said not a word about the Ertel amendment, not even in the paragraph discussing, "certain limits" that the House had put "on the Commission's authority to grant exemptions." By contrast, the report did enumerate and discuss the three limitations adopted in subsections (e) and (g). *Id.* at 104-105. As noted in Part IV above, each of these limitations on the Commission's section 10505(a) exemption authority was, in marked contrast to subsection (f), ex-

plicitly worded as a restriction on, not an illustration of, the Commission's authority.[11]

Nor did the discussion of the conference substitute mention subsection (f). Rather, the conferees explained:

> The bill permits exemptions *wherever regulation is not needed to prevent abuses of market power*, regardless of the presence of effective competition. The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, *the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress* to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemptions from remaining regulation. *The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power* where other federal remedies are inadequate for this purpose.

Id. at 105 (emphasis added). The report continued to note that the conferees "particularly" expected that the Commission would reduce economic regulation of services provided by rail carriers. *Id.*

In light of this legislative history, we think that the ICC could reasonably interpret subsection (f) not to limit the Commission's general section 10505(a) exemption authority, but instead, simply to identify TOFC/COFC service

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[11] The report mistakenly referred to subsection (g) as subsection (f), which it had been before the Ertel amendment. No other amendment to § 10505 could plausibly be [redacted] a "limit" on ICC exemption authority.

provided by rail carriers as a service meet for Commission exemption. *See American Trucking Ass'ns*, 656 F.2d at 1120-21. This interpretation is consistent with the House committee's favorable reference to the *Sub-No. 5* proceedings, and with the conferees' position that Congress could identify only "broad areas of [c]ommerce where reduced regulation is clearly warranted." The ICC, according to the conferees, would necessarily enjoy large discretion in carrying out the deregulatory program that Congress envisioned.

Nor, we reiterate, did the sponsor of section 10505(f), Representative Ertel, see it as limiting the Commission's exemption powers. Indeed, he complained that existing regulation had unjustifiably burdened intermodal transportation, particularly by imposing uncoordinated regulatory regimes upon its rail, motor, and water legs. Section 10505(f) was to be a "first step" forwarding TOFC deregulation, not its final resting place. It would be ironic, then, if we were to construe this same section to bar the ICC from taking further steps consonant with the Commission's general powers under section 10505(a), and to prevent the Commission from coordinating its regulatory approach to the various segments of TOFC/COFC service.

VI.

We hold, in sum, that the ICC's construction of section 10505 is a permissible reading of the statute, not that the Commission has advanced the only permissible reading. Indeed, we note—although neither side to this appeal has made the point—that from late 1980 to early 1981, the Commission itself read the statute in the very way that Central States still espouses.

The August 1979 ANPR for *Sub-No. 5*, issued before passage of either the Staggers Act or the MCA, did not propose any exemptions for TOFC/COFC motor carrier operations. *See* 44 Fed.Reg. at 49279 (summary of topics

for proposed rulemaking); *see also id.* at 49280. The ANPR did, however, mention in its "general proposals" section[12] the "possibility . . . that the motor carrier portion of TOFC/COFC service might be exempted from regulation as a service in ' . . . a matter related to a rail carrier' under section 10505([a]) (the rail exemption)." The Commission sought public comment on this approach, but remarked that "it is by no means clear that the exemption can be construed to apply to 'rail-related' motor services."

Accordingly, the Commission did not propose deregulation of any motor carrier TOFC/COFC service in its November 1980 Notice of Proposed Rule ("NPR"). The Commission began the NPR by observing that the Staggers Act and the MCA, both enacted between the ANPR and the NPR, had

> profoundly affected the content, direction, and procedure of this proceeding. Our exemption authority related to transportation provided by railroads has been strengthened and clarified. Nonrail regulatory barriers have been essentially eliminated.

364 I.C.C. at 392.[13] Just as Central States now does, the Commission initially read the MCA amendments, together with subsection (f)'s specific reference to the Commission's exemption authority over "transportation that is provided by a rail carrier," to mean that it had no authority to deregulate motor carrier TOFC/COFC service *not* provided by a railroad. The Commission concluded:

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[12] The Commission described these proposals as "intended to stimulate thought and comment." *Id.* at 49280.

[13] As we have seen, the Commission's exemption authority over rail-related transportation was "strengthened" by the revised 10505(a), and its authority to deregulate transportation provided by a rail carrier was "clarified" by the new section 10505(f). The "nonrail regulatory barriers" were "essentially eliminated" by the MCA, which accomplished three of the five reforms that the rule-making was intended to pursue. *See supra* p. 1106 & note 10.

> The advance notice raised the possibility of exempting the motor portion of TOFC service. Under the new law exemption is limited to "transportation that is provided by a rail carrier." Although exemption of the motor portion not provided by a rail carrier is no longer possible, we are satisfied that many of the regulatory barriers to intermodal service which we identified in the advance notice have been removed by the Motor Carrier Act of 1980.

NPR at 396. Three months later, the Commission adopted the proposed rules in *Sub-No. 5* with only technical changes, and without a word as to its exemption authority over motor TOFC service not provided by a railroad. 364 I.C.C. 731, 739-40 (1981).

On the same day that it adopted final rules in *Sub-No. 5*—and just ninety days after professing its lack of authority to exempt motor TOFC transportation not provided by a railroad—the ICC proposed to "round out the approved exemption" in a new proceeding, *Sub-No. 6*, that would exempt motor TOFC transportation "performed by the railroad or any motor carrier regardless of its ownership or affiliation." 46 Fed.Reg. at 14365 (proposed Feb. 27, 1981). The Commission particularly emphasized its authority under sections 10505(a) and (f) to exempt railroad-affiliated trucking service, but it also cited comments from the *Sub-No. 5* proceeding that supported ICC authority to deregulate all TOFC truck service. Commissioner Clapp, concurring separately, noted that the proposed rule "would exempt all motor carrier TOFC/COFC transportation. This may go beyond the bounds contemplated by 49 U.S.C. § 10505," Clapp said, and he encouraged participants in the rulemaking to address this issue. *Id.*

More than six years later, the Commission issued final rules in *Sub-No. 6*. The rules deregulated TOFC trucking service when performed by motor carriers operating as

agents of railroads or as their joint-rate partners. While the Commission did not deregulate independently arranged pickup and delivery service, it did offer a reasoned analysis justifying its authority to do so.

The Commission observed, first, that "[i]t has long been recognized that the rail and highway . . . portions of TOFC/COFC service are integrally related, because no single mode of transportation standing alone normally satisfies the needs of a TOFC/COFC shipper." *Sub-No. 6*, 3 I.C.C.2d 869, 872 (citing *American Trucking Ass'ns*, 387 U.S. at 420). Relying on the Fifth Circuit's 1981 affirmance of the *Sub-No. 5* decision, the Commission now argued that the source of its exemption authority is section 10505(a), while section 10505(f) merely "illustrates a type of service as to which Congress suggested the exemption authority be exercised." 3 I.C.C.2d at 872 (citing *American Trucking Ass'ns*, 656 F.2d at 1120-21). The ICC rejected the argument, based on the MCA amendments, that it once found persuasive:

> The motor carrier legislation was debated and enacted before Congress completed the 1980 rail legislation, and Congress at that time had not yet decided whether or to what extent rail piggyback service should be exempted. Thus, although Congress itself did not create an exemption for joint motor/rail TOFC/COFC services at the time that it passed the MCA, later in the Staggers Act it delegated to us the discretion to grant such an exemption by relaxing the requirements for an exemption "in a matter related to a rail carrier" and simultaneously singling out TOFC/COFC as a likely candidate for exemption.

Id. at 876.

The relaxed licensing provisions, the Commission said, were to apply to TOFC/COFC service until and unless the Commission granted a further exemption. *See id.* Finally, the Commission noted the Fifth Circuit's remark that Con-

gress probably had no particular view about exemption of TOFC truck service and had instead delegated that authority to the ICC. *See id.* at 877 (citing the Staggers Act conference report). Under *Chevron*, the Commission concluded, it was free to decide the issue "in any manner that is consistent with the overall statutory scheme." *Id.* With a few refinements,[14] the Commission adhered to this position in *Sub-No. 7. See* 6 I.C.C.2d 208 (1989); *Improvement of TOFC/COFC Regulations (Pickup and Delivery), Ex Parte No. 230 (Sub-No. 7)* (slip op. denying stay, Jan. 12, 1990).

Thus beginning with the *Sub-No. 6* proceedings, the ICC reversed its position of late 1980 that it lacked authority to exempt independently arranged motor TOFC/COFC operations. An agency, of course, may change its interpretation of a governing statute, but only if it provides cogent reasons for doing so. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); *Advanced Micro Devices v. CAB*, 742 F.2d 1520, 1542 (D.C.Cir.1984) ("[A]n agency changing its course must supply a reasoned analysis that prior policies and standards are being deliberately changed, not casually ignored.") (quoting *Greater Boston Television Corp. v FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971)). The Commission, we hold, offered an adequately reasoned analysis in its 1987 decision adopting final rules in *Sub-No. 6*, and it has reaffirmed that analysis in the *Sub-No. 7*, proceeding that we now review. Because we are satisfied that the Commission's current interpretation is a permissible reading of section 10505, and that the ICC has adequately justified that interpretation, we affirm the Commission's decision. Accordingly, Central States' petition for review is

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[14] The Commission now cites the colloquy among Cannon, Stevenson and Hollings in the debates over the MCA amendments. *See* 6 I.C.C.2d at 213-14 & n. 10.

Denied.

SILBERMAN, Circuit Judge, dissenting:

I wish I could join the majority opinion. This third tranche of deregulation of shipping of trailers and containers on sequential rail and truck movements (TOFC/COFC) seems eminently sensible as a policy matter, and there is much with which I heartily agree in the majority opinion concerning the dangers of applying step one of the *Chevron* analysis too broadly so as to avoid deferring to an agency's interpretation of an ambiguous statute. Nevertheless, I find the plain language of that portion of the statute, § 10505(f) which "directly addresses" the Commission's relevant authority to be a bar to the Commission's rule. Therefore, I respectfully dissent.

I.

In 1981 the Commission exempted from regulation all intermodal operations performed by railroad-*owned* trucks. *See Improvement of TOFC/COFC Regulations*, 364 I.C.C. 731 (1981). The Fifth Circuit denied a petition for review of the ICC's order in *American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir.1981), holding that the truck portion of an intermodal movement was "related to a rail carrier providing transportation" within the meaning of 10505(a). It also suggested in addition that the truck portion was in fact "provided by a rail carrier" within the meaning of 10505(f), *see id.* at 1120.

The Commission then took a second deregulatory step and exempted from regulation independent motor carriers engaged in intermodal traffic where a motor carrier was affiliated with a railroad by acting as an agent of a railroad or pursuant to a joint rate with a railroad.[1] *See Improve-*

[1] In a joint rate arrangement, the shippers is faced with one bill for the entire voyage and the apportionment of the charged sum as well as the liability for any damage is contractually established between the motor carrier and the railroad.

ment of TOFC/COFC Regulations, 3 I.C.C.2d 869 (1987). This exemption covered those instances where a shipper dealt with a motor carrier and a railroad which were holding out their joint service to the customer as a single operation.

The next step was the order challenged by this petition. It deregulates independent motor carrier services which are a part of the intermodal movement even when there is no affiliation between the motor carrier and the railroad. *Improvement of TOFC/COFC Regulation*, 6 I.C.C.2d 208 (1989). The exemption applies when the railroad picks up a trailer/container from a motor carrier or vice versa. The shipper, however, may enter into two unrelated contracts with a railroad and a motor carrier and arrange the timing of the intermodal transfer while dealing with both the motor carrier and the railroad as two separate entities.

II.

I agree with my colleagues that subsection 10505(a) if read *by itself* can be said to be ambiguous on the issue before us.[2] The phrase "in a matter related to a rail carrier providing transportation . . . ," is unclear in its reach because the term "related" is imprecise. It could be construed—perhaps, it is more obviously construed—as did dissenting Commissioner Lamboley—to concern *only* such

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[2] (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of § 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

matters as "tariff filing, rates and charges, abandonments, acquisitions and securities issuances" involving *railroads. Improvement of TOFC/COFC Regulation*, 6 I.C.C.2d at 224. On the other hand, if section (a) stood alone it might be thought to give the Commission authority to exempt motor carriage as part of through movements when a railroad owns the trucking facilities or when the railroad is affiliated through a joint bill with a trucking company; or it perhaps could even be stretched to extend ICC authority to the "matters" in this case, where the only connection between the railroad and the trucking company is the continuous movement of the container. In other words, were this the only portion of section 10505 that came into play, I would agree that this case should be analyzed under *Chevron* "Step II."

Inconvenient though it may be, the very same section of the Act includes another subsection which squarely deals with the subject of *intermodal* transportation deregulation:

> (f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

That subsection quite specifically authorizes the Commission to exempt trucking and water carriage from its regulation under two conditions: when it is "provided" by a rail carrier and when it is part of a continuous movement.[3] As petitioners point out, both subsections must be examined at which point two propositions are apparent: (1) that Congress "directly addressed" the issue presented to us in subsection (f), and (2) therefore, the interpretation the Commission places on subsection (a) is simply implausible.

The ICC does not claim that railroads are "providing" the intermodal carriage at issue here. Instead, the Com-

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[3] It is undisputed that in this case the movements are "continuous."

mission claims, and the majority accepts the notion, that subsection (f) does not mean what it says; that it does not "limit" the Commission's power to deregulate trucking rates to those circumstances where the railroads are providing the motor carriage as part of a continuous movement. The Commission reaches its rather farfetched interpretation of the language of the statute by first analyzing subsection (a) as if it were passed years previously and after arriving at a broad meaning for subsection (a)—a meaning which authorizes the Commission's rule—only then questioning whether Congress really intended to cut back on that broad grant by subsequently passing subsection (f). I think that approach is quite artificial. After all, we are examining two subsections passed *in the very same statute* and we have said repeatedly that "statutes should be construed 'to give effect, if possible, to every word Congress used.' " *American Fed'n of Gov't Employees v. FLRA*, 798 F.2d 1525, 1528 (D.C.Cir.1986) (citations omitted). To be sure, as the majority emphasizes, Maj. Op. at 1106-1107, subsection (f) was a floor amendment, but I do not think it can be read out of the statute because a Congressman offered his amendment in that fashion. Although the conference report does not specifically mention subsection (f)—indeed, the report was apparently written before the amendment because it refers to a subsection (g) that (f) replaced—we know that the amendment was offered by a real live Congressman, Ertel,[4] and voted upon by a real live Congress.

The majority seems to follow the same reasoning process as the Commission. By the time my colleagues get around to discussing what they agree is the main issue of the case—the interpretation of section (f)—it would appear that they are already convinced that subsection (a) is a positive

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[4] Conference Reports, as we know, do not always share that characteristic. *See Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 947, 103 L.Ed.2d 67 (1989) (Scalia, J., concurring).

grant of authority to do *all* that the Commission would like to do regarding intermodal transportation. Accordingly, subsection (f) is read with what seems to be a jaundiced eye that finds linguistic imprecision and ambiguity where it does not exist. Indeed, the majority suggests (albeit only suggests) a notion that not even the Commission advanced, that subsection (f) can be thought to be ambiguous because it is in tension with subsection (a). Maj. Op. at 1105. That is naked analytical bootstrapping since the tension is only created *after* the court gives subsection (a) a sweeping meaning in conflict with subsection (f).

The crucial issue, of course, is whether subsection (f) can be thought to be ambiguous. Only by so holding, and thereby passing this first step of *Chevron*, can the majority go on to consider whether the Commission's interpretation is reasonable. The majority concludes that it is ambiguous and therefore it can proceed because subsection (f) does not address "the precise question at issue," which must be: was the Commission authorized to deregulate the rates on the trucking portion of intermodal service when railroads *cannot* be thought to "provide" that trucking service? I quite agree with my colleagues, indeed, I think it very important to be said, that if the Courts of Appeals read the "precise question at issue" too broadly the Supreme Court's decision in *Chevron* can be undermined and appropriate deference to an agency interpretation would thereby be avoided. I understand us to be in disagreement, however, not as to the precise question before us but rather as to how to interpret Congress' answer.

The majority would have it that Congress was silent as to trucking that is part of intermodal transportation and is *not* provided by a railroad. I do not think that is a fair reading of the text any more than if Congress banned the importation of apples, oranges, and bananas from a particular country and it were then argued that the ban included grapefruits as well. In both cases what is perhaps the most reliable maxim of statutory construction, *expres-*

sio unius est exclusio alterius, tells us that Congress does have a specific intent to authorize certain actions but not other actions not specified, *see Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C.Cir.), *aff'd by an equally divided Court*, 493 U.S. 38, 110 S.Ct. 398, 107 L.Ed.2d 277 (1989). Subsection (f) did not say to the ICC "go and deregulate to your heart's content," it did not say "deregulate any and *all* motor carriage," and it did not say "deregulate motor carriage used to transport containers travelling intermodal *whether or not* such motor carriage is provided by railroads and whether or not the intermodal movements are continuous."[5]

Surely if subsection (f) is thought to be a positive law authorizing agency action that would not otherwise be permitted, then my reading is compelling. The majority, it seems to me, tacitly concedes the point by claiming that subsection (f) can be read as "permissive," Maj. Op. at 1105 which I take to mean it can be interpreted as words Congress adopted while intending them to have no legal effect whatsoever. It is suggested that subsection (f) might have been designed to "encourage" (not to authorize) the Commission in proceeding with a then-pending rulemaking "to determine whether some form of exemption for the *rail portion* of TOFC service is a feasible method of accomplishing our purpose of encouraging this intermodal service." Maj. Op. at 1106 (quoting Notice of Rulemaking, 44 Fed.Reg. 49,279, 49,280 (Aug. 22, 1979)) (emphasis added). But Congressman Ertel when introducing his amendment did not mention the proposed rulemaking which in any case was not directed at deregulating the motor carriage segment of intermodal transportation. It was only after passage of the statute, including the Ertel amendment, that the Commission broadened the rulemaking's

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[5] I assume the majority would similarly disregard the continuity limitation if the Commission wished to take the "next step."

focus. Nor did Congressman Ertel suggest (not surprisingly) that his amendment was not necessary because it merely duplicated the authority bestowed in subsection (a). Yet as I understand the majority opinion, Congressman Ertel might as well have stayed home—his amendment has no legal significance. Subsection (f), we are to believe, was passed as an amendment only to suggest to the Commission a good example—"a particularly appropriate candidate" for the exercise of its subsection (a) broad exemption authority. Maj. Op. at 1105. Congressman Ertel might well respond with the old line, "If I wanted to send a message I would use Western Union."[6]

To be sure, as the majority notes at 1105, Congressman Ertel could have phrased his amendment, the grant of authority in subsection (f), to include a reciprocal prohibition against the ICC deregulating truck carriage rates when the intermodal service is *not* provided by a railroad. In other words, he could have made the implicit "not" explicit—but he had no reason to do so. Congressman Ertel could not have known that the ICC would subsequently in three steps construe subsection (a) as granting the Commission such broad authority as to, at this point, render subsection (f) meaningless.

Finally, the majority relies upon legislative history, the discussion of which it incorporates by reference into its *Chevron* step one analysis, as inadequate to establish that petitioner's reading of the statute is "unambiguously correct," Maj. Op. at 1105. That sounds very much as if the majority is adopting a rather unorthodox approach to statutory interpretation—indeed one that turns tradition on its head—by insisting that Congress confirm the plain

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[6] He did say, as the majority quotes, that "my amendment is a *first step* toward a coherent nat[ion]al transportation system," Maj. Op. at 1107, but I find it impossible to glean from that statement even the suggestion that the Commission was authorized to take any number of future steps on its own.

meaning of statutory language with legislative history. In any event, there is nothing in the legislative history—absolutely nothing—that contradicts the plain meaning of subsection (f). Indeed, as Commissioner Lamboley forcefully pointed out in his dissent, "the most salient aspect of that history was the full Senate's *rejection* of a Commerce Committee amendment to the [Motor Carrier Act] which would have exempted independently provided truck service incidental to rail TOFC transport." 6 I.C.C.2d at 224-25 (emphasis added).[7]

* * * * * *

This is a case of the self-confirming hypothesis. It is possible to arrive at the majority's position only if one is led first to pour specific content into subsection (a)—to make it say directly what it does not say but might be read to say in the absence of subsection (f). Then, after constructing this analytical castle, one may ask skeptically, as does the majority, did Congress really intend to cut down the castle's ramparts. The answer at that point is, I submit, all too compelling.

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[7] The Motor Carrier Act is a different, although complementary, statute, but it was enacted the same year and the incident to which Commissioner Lamboley refers is the only time that Congress directly addressed the intermodal transportation issue (other than in the language of § 10505(f)).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1990

No. 90-1008

Central States Motor Freight Bureau, Inc.,
Petitioners

v.

Interstate Commerce Commission and
United States of America,
Respondent

United States Court of Appeals
For the District of Columbia Circuit

FILED MAR 28 1991

CONSTANCE L. DUPRE
CLERK

BEFORE: Ruth B. Ginsburg, Silberman and Sentelle, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing, filed March 15, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Silberman would grant the Petition for Rehearing.

APPENDIX C

EX PARTE NO. 230 (SUB-NO. 7)

IMPROVEMENT OF TOFC/COFC REGULATIONS
(Pickup and Delivery)

Decided: November 27, 1989

Regulations adopted exempting the motor carrier pickup and delivery portion of TOFC/COFC service.

BY THE COMMISSION:

We are exempting from economic regulation the motor carrier pickup and delivery portion of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) services (sometimes called piggyback service). Under 49 U.S.C. § 10505, we find that the motor carrier portion of such coordinated TOFC/COFC service, which by definition involves a prior or subsequent movement by rail carrier, is a matter related to rail carrier transportation, and that application of the Interstate Commerce Act is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power. "Plan I" service (in which rail service is substituted for a portion of a motor carrier's authorized service) is not being exempted as a class at this time. We will assess applications for individual Plan I exemptions on a case-by-case basis.

BACKGROUND

The TOFC/COFC exemption proceedings were initiated when we exempted, pursuant to 49 U.S.C. § 10505,[1] TOFC/

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[1] The provisions of 49 U.S.C. § 10505(a) and (f) provide:

(a) In a matter related to a rail carrier providing transportation

COFC services provided by railroads on flatcars or in rail-owned trucks. *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, *aff'd, American Trucking Assn's v. ICC*, 656 F.2d 1115 (5th Cir. 1981) (*ATA*). Contemporaneously with the issuance of our Sub-No. 5 decision, we sought comment on whether we could and should "round out" the exemption to its logical scope by extending its coverage to over-the-road TOFC/COFC services performed in equipment not owned and operated by a railroad. Ex Parte No. 230 (Sub.-No. 6), *Improvement of TOFC/COFC Regulations*, 46 Fed. Reg. 14,365 (1981).

The public response to the Sub-No. 6 proposal was consistent with past expressions. A majority of the participating motor common carrier interests opposed a broadened exemption. They argued, as they had in the Sub-No. 5 proceeding, that we lack jurisdiction to exempt any service in trucks, and that absent regulation the railroads would likely abuse their market power. The railroads and various shipper groups generally supported the proposal. They argued, as they had in the Sub-No. 5 proceeding, that we have statutory authority to exempt truck service that is related to rail, and that the competitiveness of the TOFC/COFC market would protect the shipping public from any potential abuse of market power.

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subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle-

(1) is not necessary to carry out the transportation policy of § 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

* * *

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

During the course of the Sub-No. 6 proceeding it became apparent that, although there were different legal and, perhaps, practical considerations associated with exempting different types of piggyback operations, most of the parties had addressed the issues only generally, and had not specifically focused on precisely which types of piggyback services could and should be exempted.[2] Given the generality our notice and of the comments received, we were concerned that we lacked sufficient information to make an informed determination as to the proper scope of the exemption. Accordingly, we decided to limit the Sub-No. 6 exemption to TOFC/COFC operations performed by a motor carrier either as the agent or the joint rate partner of a rail carrier. *Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869 (1987). We concluded that this modest expansion of the prior exemption was warranted,[3] even in light of the minimal record developed, under either the generally applicable "related to rail" criterion of § 10505(a) or the more specific "provided by rail" provision of § 10505(f).[4]

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[2] Several motor carrier organizations did discuss, in supplemental comments, what they viewed as the practical ramifications of exempting Plan I TOFC/COFC. In response to their comments, we concluded that different types of operations might best be assessed separately, and we expressly declined to exempt Plan I in our Sub-No. 6 decision. We will continue to address Plan I services separately in this decision.

[3] Among other things, we found that a joint rate exemption would promote intermodalism because it would "eliminat[e] any doubts about the propriety or format of a joint rate between a regulated and an unregulated entity * * *." 3 I.C.C.2d at 880 n.15. As the comments here were filed shortly after the Sub-No. 6 decision was issued, it is difficult to determine the extent to which that action may have encouraged initiation of new joint rate arrangements. In any event, it appears to us that the additional exemption proposed here is appropriate.

[4] One set of commentors that did not participate in the Sub-No. 6 proceeding, American Institute for Shippers' Associations, Inc., and Intermodal Marketing Association (collectively referred to as "Shippers'

We instituted the instant proceeding to elicit more detailed comments, once the parties had acquired substantial experience under the Sub-No. 5 exemption, on whether the exemption should be expanded to cover motor carrier TOFC/COFC pickup and delivery operations. Noting the direct connection of these services to rail carriers and the apparently intense competitive environment, we expressed our preliminary view in our notice of proposed rulemaking that the logical scope of the class exemption should extend to all motor/rail TOFC/COFC services (save perhaps Plan I). We also requested responses to various, specific questions designed to enhance our understanding of the industry's evolution since 1980 and whether a further exemption would be consistent with the provisions and policies of the Interstate Commerce Act, as amended in 1980 with respect to both rail and motor carriers.

THE COMMENTS

Certain motor carrier interests[5] again opposed the exemption largely on jurisdictional grounds. Some individual motor carriers, by contrast, supported the exemption as a means to increase their participation in TOFC/COFC traffic. Rail carriers, looking to facilitate coordination with motor carriers (and thereby increase their own intermodal traffic base), supported the exemption. Shipper interests, viewing the exemption as enhancing their ability to obtain

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Agents"), criticizes the Sub-No. 6 decision. They claim that the decision should not have relied on assertedly "extraneous" considerations such as the existence of joint rate or agency arrangements, characterizing them (comments at 9) as "sloppy parameters for the exemption." The courts, however, have for years relied on such factors in determining whether and how a particular movement is to be regulated. *See, e.g., IML Seatransit, Ltd. V. United States*, 343 F. Supp. 32 (N.D. Cal.), *aff'd per curiam*, 409 U.S. 1002 (1972).

[5] A group of rate bureaus and the Regular Common Carrier Conference (RCCC), hereafter termed the "opposing motor carrier interests."

a low-priced intermodal transportation package, supported the proposal.

The comments have assisted us in understanding how the industry has responded to the deregulation of rail TOFC/COFC in the early 1980's. Most significantly, the sharp increase in the railroads' piggyback traffic base, the inability of motor carriers to document any of the market power abuses that they had predicted, and the strong shipper support for further deregulation confirm the success of the TOFC/COFC exemption program to date.

Yet the comments indicate that Sub-No. 6 did not take the piggyback exemption to its logical scope. Our expansion of the exemption in that case was modest, and it presupposed that the participating carriers would be willing to assume the legal responsibilities associated with the required agency or joint rate partnership arrangements. But the railroad testimony indicates that many motor carriers are reluctant to operate as railroad "subordinates," because they would prefer to maintain their separate identities as motor carriers. The Shippers' Agents, which indicate that they are responsible for coordinating the substantial bulk of the nation's TOFC/COFC traffic, report that in their experience most railroads prefer to "wholesale" their business[6] rather than tie themselves legally to individual motor carriers through joint rate or agency arrangements.[7] *See* similar observations in the comments of

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[6] In "wholesaling" piggyback services the railroads specialize in the sale of ramp-to-ramp transportation to large shippers or to shippers' agents, brokers, or other third party intermediaries. The shippers' agents and other third party intermediaries buy large blocks of rail capacity and in turn market or "retail" the rail service directly to the shipping public.

[7] One railroad witness's testimony indicates that in the past approximately 6% of his company's TOFC/COFC traffic has moved under joint rate or agency arrangements. Approximately 80% of the remaining traffic was commercial zone traffic that is already exempt from Commission regulation.

Pennsylvania Truck Lines. Thus, while our Sub-No. 6 exemption undoubtedly did ease some unnecessary regulatory burdens, we think we can and should do more. *See* 49 U.S.C. § 10505(a) ("the Commission *shall* exempt * * * .") (emphasis added). The focus of our inquiry will be on whether the removal of additional regulatory burdens is consistent with the provisions and goals of § 10505.

DISCUSSION AND CONCLUSIONS

At the outset, we note that the issues here are similar to those that we considered in Sub-No. 6. The difference here is primarily one of degree. Because the arguments raised here concerning our statutory authority to exempt any motor carriage and the likelihood of market power abuse in light of the existing competitive climate are identical to those raised and addressed there, we incorporate by reference here our decision found at 3 I.C.C.2d 869.

A. *Related to Rail.* The threshold issue in this case, as it has been in the other related piggyback exemption cases, is whether the service at issue involves "a matter related to a rail carrier providing transportation subject to the jurisdiction of the * * * Commission * * * ." 49 U.S.C. § 10505(a). Proponents of this exemption rely largely on the apparently plain meaning of the "related to" language. They argue that the motor carrier pickup and delivery portion of piggyback service is a matter related to a "rail carrier providing transportation * * * ," because of the operational relationship of the two separate rail and motor legs that make up the coordinated TOFC/COFC movement. Relying largely on what they view as incompatible statutory directives in the Motor Carrier Act of 1980 (MCA), the opponents of the exemption claim that the service at issue is not rail-related, because it is not provided by rail carriers. Their view seems to be that the "related-to-rail" language really means "provided by rail." We reject the motor carriers' arguments, as we did earlier, and find that the motor carrier services at issue here are related to rail

carriers providing transportation subject to Commission jurisdiction, for the reasons noted below. We note that the Supreme Court rejected arguments similar to those made by the motor carriers in holding that the State of Texas's authority to regulate the intrastate motor portion of piggyback movements is preempted by the ICC's Sub-No. 5 exemption. *ICC v. Texas*, 479 U.S. 450 (1987).

The first step in ascertaining legislative intent is to examine the language of the statute itself. Here, the language of § 10505(a) applies to matters "related to a rail carrier providing transportation subject to [Commission] jurisdiction." It does not limit our exemption authority to services "provided by" rail carriers. Moreover, the statutory framework indicates that Congress intended to set up a broad "related to" standard in § 10505(a) that would embrace all services that *might* be appropriate for exemption, and also to identify in § 10505(f) a narrower category of services "provided by" rail carriers as examples of matters that *should* be candidates for exemption. *See ATA*, 656 F.2d at 1120-21. Had Congress intended to equate the broad, somewhat discretionary public interest standard associated with the "related to" language with the more exhortative "provided by" provision, there would have been no reason to have enacted the two provisions separately. Thus, the fact that pickup and delivery operations not provided by railroad do not qualify for exemption under § 10505(f) is immaterial to whether they qualify under the "related to rail" language of § 10505(a).

As the proponents of this exemption note, an equipment interchange agreement establishes an operational relationship between the trucker and the railroad, and it ensures continuity in the movement of the goods. In short, as we noted in our prior decision, motor service that is part of a continuous intermodal movement is, by definition, related to rail:

> A railroad cannot provide such intermodal service without first receiving a trailer or container, which is generally moved-over-the-road by truck. The highway movement of containers and trailers is an integral and necessary element of TOFC/COFC service. As the Supreme Court recognized in [*American Trucking v. A.T. & S.F.R. Co.*, 387 U.S. 397, 420 (1967), and *ICC v. Texas*], and the reviewing court noted in *ATA*, TOFC/COFC service is, by its very nature, bimodal, and the participants that exchange the lading are natural business partners.

3 I.C.C.2d at 873-74. The courts and the Commission[8] have found since the earliest days of intermodalism that the motor and rail legs of a continuous TOFC/COFC movement are related. As discussed below, the MCA, in our view, recognized and confirmed that finding.

The opposing motor carrier interests disagree with this view. They note that the MCA explicitly addressed various motor carrier issues in general and TOFC/COFC issues in particular. They argue that this attention precludes the Commission from taking further inconsistent administrative action in the field. We do not believe that our action here is inconsistent with any directives of the MCA. As we held earlier in addressing this argument (3 I.C.C.2d at 873-77), the fact that Congress relaxed but did not exempt motor carrier piggyback regulation in the MCA does not preclude the Commission from exempting this traffic, particularly when such action is consistent with the policies of the subsequently enacted Staggers Act.[9] To the con-

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[8] *See Substituted Service—Piggyback*, 322 I.C.C. 301 (1964), *aff'd, American Trucking v. A.T. & S.F.R. Co.*, 387 U.S. 397 (1967).

[9] A stronger version of the same argument was rejected in *ICC v. Texas, supra*, where the Court found that the express reservation of state jurisdiction to regulate intrastate motor carriage did not override the exemption of intrastate motor carrier operations related to intrastate piggyback rail service.

trary, the legislative history of the MCA indicates to us that Congress recognized the intimate relationship between the motor and rail legs of a through movement, and that it expected that motor carrier piggyback service might be exempted after further study.[10]

Accordingly, we find that the motor portion of a TOFC/COFC shipment that is covered by an interchange agreement between a motor carrier and a railroad is a matter related to a rail carrier for purposes of § 10505(a).

B. *Rail Transportation Policy and Abuse of Market Power.* Section 10505(a) requires an exemption if we find that continued regulation is not necessary to further the rail transportation policy (RTP) of section 10101a or to protect shippers from potential abuses of market power. Given our favorable experience to date with the TOFC exemptions and the fact that much motor carrier TOFC/COFC service (commercial zone traffic, traffic moving under agency arrangements or joint rates, and traffic handled in rail-owned trucks) is already exempt,[11] we conclude that

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[10] *See* the discussion among Senators Stevenson, Cannon, and Hollings, 126 Cong. Rec. S 7825-26 (Apr. 15, 1980). Senator Stevenson supported an outright exemption of incidental-to-rail trucking services, on the ground that it would "encourage piggyback." Senator Cannon and Senator Hollings opposed the exemption, essentially for two reasons. First, they were concerned that the matter had not been adequately explored ("[W]e simply need more time and more testimony before we drive into this matter".). Second, they believed that it would be anomalous to exempt the motor portion of a movement when the rail portion was still regulated (unless rail piggyback were deregulated, it would be inappropriate to "creat[e] a situation of half-regulated, half-unregulated transportation where that situation did not exist before".). The matter has by now been explored in considerable detail, and the rail portion of the transportation, of course, is now exempt.

[11] As an alternative to a finding that regulation is not necessary to protect shippers from abuse of market power, § 10505(a) authorizes us to exempt services that are limited in scope. Because much motor carrier piggyback service is already exempt, the services at issue here are rather limited in scope. Nevertheless, in light of our concern that

further regulation of this service is neither necessary nor desirable.

The RTP expresses several Congressional goals to guide the Commission in its regulation of rail carriers. In general, the RTP contemplates that market discipline in competitive markets, rather than government regulation, is the best way to ensure a healthy transportation system that will most efficiently meet the needs of the shipping public. *See generally* 3 I.C.C.2d at 878-881. We have found in our prior piggyback exemption decisions that the TOFC/COFC market is highly competitive. Those findings are confirmed by articles in the trade press nearly every day, and by the studies referred to in RCCC's comments.[12] One basis for the motor carrier opposition to our prior exemptions has been the claim that railroads and motor carriers whose piggyback operations are exempt would abuse market power. To date, portions of piggyback traffic have been exempt for several years, yet no party has presented any information demonstrating such abuses. In short, we see no evidence from which we could conclude that continued regulation is necessary to further the RTP or to protect shippers. To the contrary, the strong support of the shippers for a broadened exemption confirms the success of the intermodal exemption program thus far.

The only remaining question, then, is whether there is any other reason not to take this logical and modest (*see* n.7, *supra*) next step and extend the exemption as proposed here. We can see none. Indeed, in light of the observations during the Congressional MCA debate about the

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shippers not be subjected to potential abuses of market power, we will not rely on the limited in scope provisions here.

[12] *See also Railroad TOFC/COFC Monitoring Study, Office of Transporation Analysis*, Interstate Commerce Commission, December 1985; *Intermodalism: The Rail/Truck Battle Rages On*, Journal of Commerce Special Report, June 13, 1989; *Transportation Services: Railroads*, 1988 U.S. Industrial Outlook, U.S. Department of Commerce, January 1988.

anomaly of having "freight movements [that] are half-regulated, half-unregulated" (126 Cong. Rec. at 7825; *see also id.* at 7826: "the fact is the railroads are not deregulated"), we think that, if the MCA had been enacted after some experience with the TOFC/COFC exemption established in our Sub-No. 5 proceeding, Congress might well have been more direct in supporting this type of exemption.

We agree with the suggestion in RCCC's comments[13] that the action proposed here will not revolutionize the transportation environment (as did Sub-No. 5). But it should have some clear benefits for the shipping public: more efficient coordinated service; more flexibility with respect to rates and services; better and more equal opportunities for shippers' associations to compete with parties able to take advantage of exempt joint rate or agency arrangements; more competition among truckers for ex-rail traffic; and greater freedom from unnecessary and unproductive economic regulatory constraints. The purpose of this and the prior piggyback exemptions is to free carriers from unnecessary economic regulation so that they are better able to compete in the marketplace.[14] We read

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[13] RCCC seems to argue that the exemption should be denied because non-regulatory railroad improvements (rather than deregulation) will be necessary before railroads will be able to divert traffic from long haul truckers. Although there is always room for non-regulatory industry improvements, the strong support for the exemption expressed by the Shippers' Agents, which use both all-motor and coordinated intermodal services, suggests that regulatory improvements will also improve service. But in any event, RCCC argues only that an exemption may not help the railroads much. It does not argue, as it must if it is to prevail under the statute, that regulation is necessary to carry out the RTP or protect shippers from abuse of market power.

[14] During the MCA debates Senator Stevenson clearly expressed his view that deregulation of TOFC/COFC would increase competition, encourage intermodalism, improve fuel efficiency, reduce transportation costs, facilitate highway maintenance programs, and, "[i]n short, * * *

our mandate as requiring that we issue an exemption once we find that a service meets the criteria of § 10505(a). Accordingly, we will grant the exemption as proposed.[15]

C. *Plan I Services.* In the Sub-No. 6 decision we declined to issue a classwide exemption for all Plan I TOFC/COFC service because of the lack of an adequate record. Plan I involves operations in which rail service is substituted for a portion of a motor carrier's authorized service. We found "that Plan I is indeed 'related to' rail carrier service," and we expressed skepticism over the claim "that the so-called 'practical' problems that the motor carriers raise—particularly with respect to collective ratemaking—could not be resolved if the parties were truly intent on providing high quality exempt service."[16] 3 I.C.C.2d at 882. For these reasons, although declining to grant a class exemption, we indicated that we would be receptive to new requests for relief as to Plan I.

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help integrate the transportation system * * *." 126 Cong. Rec. at 7825-26 (1980).

[15] Shippers' Agents have asked that we clarify the nature of the motor carriers' obligations to provide contractual terms for liability and claims. Consistent with the language of § 10505(e), our exemption of these pickup and delivery services will not relieve any carrier of any obligation (or opportunity) it would otherwise have under the liability provisions of §§ 11707 and 10730 were the services still regulated. Similarly, as we noted in the Sub-No. 6 decision, 3 I.C.C.2d at 883 n.20, this exemption does not relieve carriers of their responsibilities to comply with the Department of Transportation's safety and insurance regulations.

[16] In particular, the opposing motor carrier interests had argued that, because less-than-truckload (LTL) carriers do not know until they have aggregated several LTL shipments into a trailer whether they will perform the movement entirely by truck, or in substituted rail service: (a) the shipper would not know whether its service would be a regulated service governed by the tariff rate or an unregulated service subject to some other rate; and (b) the carrier would face antitrust exposure if it assessed collectively set class rates for what turned out to be an exempt service.

In this proceeding some shippers have provided vague support for a Plan I exemption, and one motor carrier (Overnite Transportation Co.) has argued that we should exempt Plan I service. Overnite is not concerned about antitrust liability because, in its view, few motor carriers actually use collectively set rates for most of their operations even in connection with regulated traffic. Overnite states that its customers know in advance that substituted rail service may be used, and it argues that in today's competitive market the shipper does not need to know at the outset whether a shipment will move by rail or motor.

The opposing motor carriers, consistent with their past views, again oppose a Plan I exemption. The rate bureaus appear to argue that, even if motor carriers set their Plan I rates independently, the collectively set tariff rules would still apply. RCCC also argues that it would be operationally impossible for carriers to negotiate rates separately with thousands of individual shippers. Finally, in their reply comments the rate bureaus argue that Plan I is not suitable for an exemption because "it is impossible to sort out traffic in TOFC/COFC service which will move under collectively set rates from that which will move under independently set rates."

Given the minimal support, we again decline to exempt Plan I services generically. We still find the motor carriers' arguments—particularly those concerning alleged antitrust implications and operational and mechanical difficulties associated with an exemption—to be unpersuasive. For example, carriers should not be subject to antitrust exposure for charging collectively set rates for exempt movements, as long as the carriers electing to quote such rates for their exempt traffic do so independently and without collusion. Similarly, RCCC's argument that it is operationally impossible to negotiate rates separately for thousands of individual shipments overlooks the fact that it is up to each individual carrier to determine the extent to which it wants to negotiate its exempt rates individually (as is

done by contract motor carriers) or, instead, to set up some general rate structure that would apply to all of its shippers.[17] Nevertheless, absent greater support, or an indication that relief is necessary for other reasons, we will entertain petitions from carriers seeking exemption of individual Plan I operations, but we will not exempt all such operations now.

D. *Environmental Matters.* On December 8, 1988, we issued an environmental assessment (EA) in this proceeding concluding that the proposed exemption would not likely have a significant effect on the environment or energy consumption. The EA recognized that the exemption could result in some traffic shifts from motor to rail service, but it concluded that any such shifts would likely be minor, and that therefore the beneficial environmental effects generally associated with diverting traffic from motor to rail service would not be significant.

The rate bureaus filed comments disputing the conclusions reached in the EA. First, the rate bureaus challenge what they characterize as "the EA's unsupported assumptions." Second, they contend that the exemption will adversely affect motor carrier safety and may increase terminal area congestion. To resolve these issues, they claim, we should have undertaken a comprehensive environmental impact statement (EIS) rather than simply an EA. We disagree. Under the National Environmental Policy Act (NEPA), an EIS is required only when a major federal action has the potential to result in significant environmental effects. Upon reviewing the unsubstantiated comments of the rate bureaus, we continue to believe, as

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[17] Of somewhat more concern to us is the argument that the shippers could be at a disadvantage if they do not know in advance how or at what rates a particular shipment will move. However, there is no logical reason to believe that shippers will tender freight without knowing the applicable rate. Any motor carrier seeking an individual exemption in the future should indicate how it plans to ensure shipper concurrence in the type of shipping arrangement made and the rate to be applied.

set forth in more detail below, that the environmental impacts associated with this action are not significant and, therefore, do not warrant an EIS under NEPA.

1. *Validity of EA's Assumptions.*

At the outset, the rate bureaus argue in passing that there are no empirical data proving the EA's assumptions that the exemption will enhance competitive opportunities, that it may result in a slight shift in traffic patterns, or that rail service is generally thought of as being environmentally superior to motor. These arguments do not require extensive comment. One of the basic premises underlying the piggyback exemptions that we have undertaken since 1981 is that the removal of regulatory restrictions could expand competitive opportunities. The growth in the piggyback business since 1981, which has been widely reported in the trade press, tends to confirm that the exemptions have expanded competitive opportunities, and that an expansion of competitive opportunities may shift traffic patterns and "increase the amount of traffic moving on flat cars." *See also* 126 Cong. Rec. 7825-26 (1980) (remarks of Senator Stevenson). But as RCCC points out, large-scale shifts from highway to intermodal service will depend on several factors other than deregulation. Thus, we agree with the EA that "[a]lthough it is difficult to assess the changes in traffic movement," any "shift in traffic to flatcars" may indeed be "only * * * slight."

The rate bureaus also challenge the statement that a shift in traffic from motor to rail might reduce energy consumption, air pollution, and highway congestion. But the overall environmental benefits of rail service *vis-a-vis* motor service have been recognized for years. *See, e.g.*, Senator Stevenson's remarks during the MCA deliberations, 126 Cong. Rec. 7825-26 (1980) (referring to various studies by DOT, GAO, Booz Allen, the Council of Economic Advisors, and the National Transportation Policy Study

Commission demonstrating that piggyback service "is between two and four times as fuel-efficient as all-truck service. * * * Increasing the freight moving by piggyback would also reduce highway maintenance costs."). Absent some persuasive indication that the conventional wisdom is incorrect, we see no need to conduct an EIS based an unsupported assumptions by a group of motor carriers, which presents no data of its own.

2. *Terminal Area Congestion.*

Although they challenge the EA's assumption that an exemption could result in diversion of some traffic to rail, the rate bureaus also argue that if TOFC/COFC traffic does indeed increase, then "it is also clear that there will be an increase in motor carrier congestion in and around rail terminal areas." They urge that a more detailed environmental analysis be undertaken to test whether the amount of diversion to rail that could result from this exemption would in fact be slight.

As we have just indicated, we think that diversion to rail resulting solely from this exemption will be modest. Given the many economic and operational factors that potentially affect the modal market shares of piggyback traffic and contribute to diversion, any effort to quantify how much of the potentially divertible traffic would in fact be diverted would necessarily be somewhat speculative. However, based on our experience and analysis of this type of traffic we believe that our assessment of the environmental effects is reasonable. Under NEPA, the Commission is only required to evaluate the reasonably forseeable effects of its action (*see* 40 CFR 1052.22; *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989)). We have done so in this case.

In other recent cases we have studied in more detail the environmental impacts of potentially increased terminal area congestion, and found them insignificant. For example, in No. MC-F-17934 (Sub-No. 1), *Norfolk Southern*

Corp. and North American Van Lines, Inc. - Control - Tran Star, Inc. (NS), EA (not printed), served March 28, 1988, we conducted a "worst case" analysis of the effects of increased terminal area congestion on safety, noise levels, and air quality in the vicinity of intermodal terminal areas. We found that even a substantial increase in terminal area truck traffic would not result in significant noise impacts in light of the brief period of exposure of each particular location on the way to the rail yards. We found that additional noise would not significantly change the already high noise levels at the intermodal rail yards. We found that any safety problems resulting from local congestion could be addressed by local authorities. And we found, relying on our environmental work in No. AB-19 (Sub-No. 112), *Baltimore and Ohio R. Co., Metropolitan Southern R. Co., and Washington and Western Maryland Railway Co. - Abandonment - of the Georgetown Subdivision Located in Montgomery County, MD, and the District of Columbia*, (Draft EIS served March 6, 1987, Final EIS served Oct. 2, 1987), that increased terminal area truck traffic would not significantly affect air quality.

In light of those findings, we see no benefit to be gained by further delaying this action to prepare an EIS which is not warranted under NEPA. We think that, on balance, the environmental impacts that will result if some truck traffic is diverted to truck/rail service will be favorable. We see no reason to prepare an unnecessary EIS.

3. *Safety.*

The rate bureaus also argue that allowing unregulated for-hire carriers to operate (both within and beyond the terminal areas)[18] will adversely affect safety. Their argu-

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[18] Of course, our action here will have no effect on economic regulation of motor services within commercial zones or rail terminal areas, as such operations are already statutorily exempt under other provisions of the Act.

ment is twofold: (1) that the Commission's licensing program is the most effective tool to ensure that carriers operate safely and maintain adequate insurance; and (2) that expanding the scope of permissible exempt operations might "invite into operation a whole class of unfit motor carriers." We disagree with both arguments.

We do not believe that this exemption will encourage unfit carriers to enter the market. For over eight years we have authorized unregulated TOFC/COFC operations in rail-owned trucks, and since mid-1987 independent motor carriers operating under joint rate or agency arrangements with railroads have been similarly exempt from economic regulation. During that time we have received no indication that unlicensed piggyback operators operate any less safely, or are any less likely to carry appropriate insurance, than regulated carriers. The rate bureaus' claims are simply without foundation. Similar claims were raised by various carrier interests in connection with 1980 legislation relaxing motor carrier regulation, and they too have not been borne out by experience.[19] Moreover, the claim that full economic regulation is necessary to ensure

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[19] We note that the participants in a 1987 conference on the relationship between deregulation and motor carrier safety as experienced since the 1980 motor carrier legislation concluded that "* * * no objective evidence had been found to support a position that economic deregulation had caused a degradation of highway safety * * *." *See* "Transportation Deregulation and Public Safety: Summary Report On a Conference" by Leon Moses and Ian Savage, in *Conference Proceedings on Transporation and Public Safety*, the Transportation Center, Northwestern University, June 1987, at 921. In fact, one of the most accurate measures of motor carrier safety, the Fatal Accident Reporting System data as compiled by the National Highway Traffic Safety Administration, shows that the number of fatalities from heavy truck accidents, both absolutely and in relation to the increased number of vehicle miles, has declined since motor carrier deregulation in 1980. See "The Myth of Economic Deregulation and Safety In the U.S. Motor Carrier Industry" by Richard Schweitzer, at 703, in *Conference Proceedings, etc.*

safety is particularly weak here given the nature of the TOFC/COFC shipper: a sophisticated shipper tendering large volumes of high valued freight on a regular basis.[20] In the case of piggyback, the market place, rather than regulation, will keep the business out of the hands of unsafe or uninsured operators.

The rate bureaus' other claim is that economic regulation is needed to enhance safety compliance. We disagree. It is quite true that we consider safety and insurance coverage to be paramount factors in our licensing procedures; indeed, unsafe or uninsured operators cannot obtain licenses, and established carriers that become unsafe or uninsured risk losing their licenses. But the fact that we perform these safety-related functions in connection with our economically oriented licensing activities is not a reason for regulating when there is no economic basis for doing so. This determination does not leave the public unprotected, because from an enforcement perspective, DOT, the Federal agency with primary responsibility for motor carrier safety, has the authority and the commitment to ensure that economically unregulated carriers will maintain insurance at appropriate levels as required by law and will operate safely.

Under the Motor Carrier Safety Act of 1984 ("Safety Act"), Pub. L. No. 98-554, codified at 49 U.S.C. 2501-2520. DOT has issued motor carrier safety regulations[21] that apply to virtually all motor carriers operating in in-

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[20] Under current motor carrier regulation, the Department of Transportation (DOT) safety ratings of commercial motor carriers are available to the public upon request. Thus, any shipper can now readily screen out unsafe carriers. Given the competitive nature of this market and the ample supply of quality carriers, even if unsafe operators sought to invade the TOFC/COFC market, it seems unlikely that TOFC/COFC shippers would use them.

[21] *See* 49 C.F.R. Part 390.

terstate commerce,[22] including motor carriers whose operations are exempt from ICC economic regulation.[23] DOT's authority over safety was strengthened in the Commercial Motor Vehicle Safety Act of 1986, which is designed to require states, the motor carrier industry, and individual drivers to work with DOT to ensure that only safe drivers are permitted on the road and that unsafe drivers are removed. *See generally Commercial Driver Licensing Standards' Requirements and Penalties*, 52 Fed. Reg. 20,574 (1987). In short, we are confident that our determination not to regulate this traffic will not impair highway safety.

FINDINGS

We find, under our authority at 49 U.S.C. § 10505, that: (1) TOFC/COFC pickup and delivery services performed by motor carriers as part of continuous intermodal movement are related to rail carrier transportation; and (2) application of the Interstate Commerce Act is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a or to protect shippers from the abuse of market power. Appropriate C.F.R. revisions are attached.

This action will not significantly affect the quality of the human environment or energy conservation. The exemption should have beneficial energy consumption and environmental impacts. To the extent that the exemption encourages the increased use of intermodal TOFC/COFC service in place of all-highway service, the net effect on the environment and on energy consumption should be favorable, because it is generally recognized that transportation by rail has a smaller environmental impact and

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[22] Unlike the previous DOT safety procedures, the new regulations now apply even to exempt commercial zone operations, except in areas in which a state maintains and enforces comparable regulations. *See* 49 C.F.R. § 390.5, reproduced at 53 Fed. Reg. 18,053 (1988).

[23] *See* 49 C.F.R. § 390.5, reproduced at 53 Fed. Reg. 18,053 (1988).

uses less fuel than transportation by highway. Increased use of intermodal service should also reduce highway congestion and road damage. It is not possible accurately to predict the magnitude of these effects since they will depend entirely on the actions and choices of individual carriers and shippers in an economic environment free from regulation under the Interstate Commerce Act. There is, however, no reason to expect the effect to be of major significance.

This action will have a significant economic impact on a substantial number of small entities. It imposes no new regulatory burden or requirements on any person, but instead relieves a potentially large number of persons, including small businesses, of such burdens and requirements. In this decision, we have considered the purposes and anticipated effects of the exemption, as well as the alternatives (no exemption, partial exemption) open to us. We have chosen the feasible alternative that imposes the fewest, and removes the most, regulatory burdens on small businesses and other entities.

AUTHORITY: 49 U.S.C. §§ 10505 and 10321(a); 5 U.S.C. § 553.

COMMISSIONER LAMBOLEY, dissenting:

In my judgment, we lack jurisdictional authority under provisions of § 10505 to exempt the motor carrier pickup and delivery portion of TOFC/COFC services at issue here. The majority's decision is based on its belief that this motor service is sufficiently "related-to-rail" to permit exemption under 49 U.S.C. § 10505(a). In my view, the motor-provided pickup and delivery service is beyond the scope of this provision.

To date, we have exempted those motor aspects of intermodal movements that are provided by a railroad. In

Ex Parte No. 230 (Sub-No. 5),[24] the Commission exempted what was historically known as "Plan II" service—railroad-provided door-to-door intermodal service that included, in addition to the rail line-haul movement, railroad-performed motor pickup and delivery service. In Ex Parte No. 230 (Sub-No. 6),[25] we expanded the exemption to include motor portions of TOFC/COFC operations performed by a motor carrier acting as an agent or a joint rate partner of a railroad.[26]

In each instance, authority for exemption was premised jointly on §§ 10505(a) and (f)—the motor services were considered both "a matter related to a rail carrier providing transportation" (Section 10505(a)), as well as "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." (Section 10505(f)). *See ATA*, 656 F.2d at 1120-21 and *Agency - Joint Rate*, 3 I.C.C. 2d at 874-75. From a practical viewpoint, any "related-to-rail" decisional reasoning was largely superfluous for these exemptions: the railroad provides the involved motor services and assumes full legal responsibility for the shipment as part of an integrated door-to-door transportation service.

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[24] *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd, American Trucking Assns. Inc. v. I.C.C.*, 656 F.2d 1115 (5th Cir. 1981)(*ATA*).

[25] *Improvement of TOFC/COFC Regulations*, 3 I.C.C. 2d 829 (1987)(*Agency-Joint Rate*).

[26] For outline of TOFC/COFC service Plans I through V, see generally Ex Parte No. 230, *Substituted Service - Charges and Practices of For Hire Carriers and Freight Forwarders*, 322 I.C.C. 301, 304-305 (1964) and *ATA v. ATSF*, 387 U.S. 397, 403 (1967); Plan II 1/2, *Iron & Steel Articles Between Atlanta, GA and St. Louis, MO*, 318 I.C.C. 80, 81 (1962). In exemptions such as here, the class of persons and transactional activities are relevant factors in evaluating the potential for market abuse. 49 U.S.C. § 10505(a)(2)(B). In the absence of identification of such factors, the scope 2f this exemption is not defined; ostensibly it includes Plans II 1/2, III and IV.

In contrast, the independent motor pickup and delivery portion at issue here is by definition *not* provided by a railroad. As opposed to Plan II-type service, the rail carrier here offers only ramp-to-ramp rail service. Motor pickup and delivery is arranged by the shipper independently. Instead of a contractual relationship with one carrier as part of an integrated transportation service, the shipper has potentially several, with each carrier having independent and unrelated legal obligations toward the underlying shipment when it is in its respective possession. Thus, in contrast to Sub-Nos. 5 and 6, jurisdiction for exemption consideration here cannot be found in the "provided-by-rail" language of § 10505(f), but must lie solely within the "related-to-rail" language of § 10505(a).

The majority offers two rationales to support that jurisdictional premise: (1) the "related-to-rail" statutory language of § 10505(a), complemented both by the statutory exemption framework of § 10505 in its entirety, and statements in the legislative history of the Motor Carrier Act of 1980 (MCA) which indicated a desire and/or anticipation of the eventual exemption of the independent motor carrier portion of TOFC/COFC service; and (2) Supreme Court precedent in *ICC v. Texas*, 479 U.S. 450 (1987)(*Texas*). In my view, neither is persuasive.

As for statutory construction of § 10505, neither the plain language of the statute nor relevant legislative history supports the majority's position. When read comprehensively, the language of § 10505 evidences a congressional intent to establish a broad exemption framework for rail-provided services *only*. In my view, the important "plain" language in the long introductory prepositional phrase of § 10505(a) is . . . "a rail carrier providing transportation subject to [Commission] jurisdiction." The controversial language—"[i]n a matter related to" such rail-provided transportation—simply modifies the above- noted portion of the longer phrase. The "*matters* related to" necessarily concern, in my judgment, normally

regulated activities of the rail carrier—such as tariff filing, rates and charges, abandonments, acquisitions, and securities issuances—which the Commission can exempt from its oversight if the elements in the body of § 10505(a) are satisfied. Thus, the focus in § 10505(a) is on "rail-provided" service and the underlying regulated "matters" regarding that service that can be exempted. To conclude that the prepositional language at issue extends to independent, non-rail provided motor service such as that in issue here is simply, in my judgment, an overreach. The entire statement of § 10505(a) when combined with § 10505(f) and taken as a whole establishes the statutory predicate for exemption for rail provided intermodal service only.[27]

Further, nothing in the relevant legislative history supports the majority's contrary "related-to-rail" position. In fact, the most salient aspect of that history was the full Senate's rejection of a Commerce Committee amendment to the MCA which would have exempted independently provided truck service incidental to rail TOFC transport. Any reference to Congressional statements in support of the motor exemption or expressions of expectations that it would occur at some future date simply suffer by comparison. Moreover, nothing in the Staggers Act or its legislative history offers any comfort or basis to the majority's position.[28]

The majority suggests that this type of analysis improperly equates the assertedly broad, "related-to-rail" language of § 10505(a) with the more narrowly focused "provided-by-rail" language of § 10505(f). Had Congress intended a more narrow "provided-by-rail" equivalence, the

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[27] Cf. *ATA v. I.C.C.*, *supra* at 1120-1121, *I.C.C. v. Texas*, *supra* at 460.

[28] In lieu of broad TOFC/COFC exemption, Congress in the MCA enacted § 10322(b)(2), as well as such other rail-motor provisions as § 10922(j) and 10923(e). In the Staggers Act, Congress added additional rail-motor provision in § 11344(e). See *ATA*, *supra* at 1121-1122.

argument goes, there would have been no need for the separate "related-to-rail" language in subsection (a).

To wade into this analytical framework, the majority must necessarily consider the converse: If § 10505(a) is as broad as suggested, there would have been no separate need for § 10505(f). In my judgment, § 10505(f) was enacted because § 10505(a) was confined to exemptions for rail-provided services only. Through § 10505(f), Congress expressed both its interest in having the Commission consider exemption of the rail-provided motor portion of continuous TOFC/COFC service, but also its reservation that § 10505(a) was not sufficient in its jurisdictional reach to allow it. Arguments which claim that the plain language of § 10505(a) takes it beyond rail-provided service illogically negate a need or meaningful effect for the specific provisions of § 10505(f).[29]

Lastly, the *Texas* case is not particularly apposite here. Aside from the interstate/intrastate concerns raised there, that proceeding involved motor TOFC/COFC service that was railroad- provided, with the focus on the Commission's jurisdiction under § 10505(f). It clearly differs from the situation here, which involves independently provided motor pickup and delivery service and our jurisdiction to con-

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[29] In statutory construction, the more specific provision prevails over the more general. See *I.C.C. v. Texas* at 456, 461, and *ATA v. ATSF* at 410. The exemption relationship between § 10505(a) and § 10505(f) is that of general and specific. The specific authorization of § 10505(f) is not merely illustrative; were it so, it would be redundant. Rather, it forms the definitional nexus between rail and motor activity for *exemption* proposes. In *ATA v. I.C.C.*, the Court found that transportation of TOFC/COFC traffic by *rail owned* trucks is specifically a "matter related to a rail carrier providing transporation" for which exemption may be authorized, concluding in part that:

> "We base this finding on the literal language of §§ 10505(a) *and* (f), . . ." (Emphasis added).

ATA at 1121.

sider exemption of the service solely under § 10505(a). Even without these significant distinctions, under closer examination the case itself does little to support, if not serve to contradict, the majority view.

It is ordered:

1. The over-the-road portion of TOFC/COFC pickup and delivery services provided by motor carriers as part of a continuous intermodal movement is exempted from regulation to the extent noted above.

2. The Code of Federal Regulations is amended accordingly.

3. This decision is effective January 17, 1990.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners André, Lamboley, and Phillips. Commissioner Lamboley dissented with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX

Title 49, Chapter X of the Code of Federal Regulations is amended as follows:

1. The authority citation for 49 C.F.R. Part 1090 continues to read: 49 U.S.C. §§ 10321, 10505 and 5 U.S.C. § 553.

2. Part 1090 is amended by revising Section 1090.2 to read as follows:

§ 1090.2 *Exemption of rail and highway TOFC/COFC service.*

Except as provided in 49 U.S.C. 10505(e) and (g), 10922(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. Subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

APPENDIX D

TEXT OF CITED STATUTES

28 U.S.C. §1254(1) Courts of appeals; certiorari; appeal; certified question

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §2321(a) Judicial review of Commission's orders and decisions; procedure generally; process

> (a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

28 U.S.C. §2342(5) Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

* * * * *

> (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of Title 49, United States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. §2343 Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

49 U.S.C. §12(1)(b) Authority and duties of Commission; witnesses; depositions

[repealed October 17, 1987]

(b) Whenever the Commission determines, upon petition by the Secretary or an interested party or upon its own initiative, in matters relating to a common carrier by railroad subject to this chapter, after notice and reasonable opportunity for a hearing, that the application of the provisions of this chapter (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall, by order, exempt such persons, class of persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order. The Commission may, by order, revoke any such exemption whenever it finds, after notice a reasonable opportunity for a hearing, that the application of the provisions of this chapter to the exempted person, class of persons, services, or transactions, to the extent specified in such order, is necessary to effectuate the national transportation policy declared in this Act and to achieve effective regulation by the Commission, and would serve a useful public purpose.

§ 10322. Commission action and appellate procedure in nonrail proceedings

* * * *

(b)(1) Except as provided in paragraph (2) of this subsection, a division, individual commissioner, employee board, or an employee delegate under section 10305 of this title to make an initial decision in a matter related to carrier (other than a rail carrier), or, in the case of a matter referred to a joint board under section 10341 of this title, such joint board—

(A) shall, in any case in which an oral hearing is held or the Commission has found that an issue of general transportation importance is involved, complete all evidentiary proceedings related to the matter not later than the 180th day following institution of the proceeding and shall issue in writing the initial decision not later than the 270th day following institution of the proceeding; and

(B) shall, in the case of all other proceedings subject to this section, issue in writing the initial decision by the 180th day following institution of the proceeding.

If evidence is submitted in writing or testimony is taken at an oral hearing, the initial decision shall include specific findings of fact, specific and separate conclusions of law, an order, and justification for the findings of fact, conclusions of law, and order.

(2) In any case involving an application for authority to provide motor carrier transportation incidental to trailer-on-flatcar or container-in-flatcar service by rail under subchapter II of chapter 109

of this subtitle,[1] a final decision on such application shall be issued

49 U.S.C. §10501(a)(1) General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil . . .

49 U.S.C. §10505 Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

49 U.S.C. §10521(a) General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier—

(1) between a place in—

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

49 U.S.C. §10901(a) Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

49 U.S.C. §10921 Requirement for certificate, permit, or license

Except as provided in this subchapter or another law, a person may provide transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter II, III, or IV of chapter 105 of this title or be a broker for transportation subject to the jurisdiction of the Commission under subchapter II of that chapter, only if the person holds the appropriate certificate, permit, or license issued under this subchapter authorizing the transportation or service.

§ 10922. Certificate of motor and water common carriers

* * * *

(j)(1) A person holding (A) a certificate issued under subsection (b) of this section to provide transportation as a motor common carrier of property, and (B) a permit issued under section 10923 of this subchapter to provide transportation as a motor contract carrier of property, may transport property under the certificate in the same motor vehicle and at the same time as property under the permit.

(2)(A) Subject to the provisions of this paragraph, a motor common carrier of passengers who had authority under this section to provide special or charter transportation of passengers and to provide regular-route transportation of passengers may transport the special or charter passengers in the same motor vehicle with regular-route passengers.

(B) Subparagraph (A) of this paragraph shall only apply to transportation of passengers entirely in a State if the motor common carrier of passengers has authority under the laws of such State to provide within such State special or charter transportation of passengers and regular-route transportation of passengers and if the laws of such State and the certificate, permit, or other authority under which such carrier provides intrastate transportation in such State authorizes such carrier to transport special or charter passengers in the same motor vehicle with regular-route passengers.

(C) Special or charter transportation of passengers may only be provided under subparagraph (A) of this paragraph in the same motor vehicle as regular-route transportation of passengers if the mixing of such passengers does not interfere with the obligation of the carrier to comply with section 11101 of this subtitle.

(3) Subject to such regulations as the Commission may issue, a person who has authority under this section to provide charter transportation of passengers may transport groups of charter passengers in the same motor vehicle at the same time.

§ 10923. Permits of motor and water contract carriers and household goods freight forwarders

* * * *

(b)(1) A person must file an application with the Commission for a permit to provide transportation as a contract carrier or to provide service as a households goods freight forwarder. The Commission may approve any part of the application or deny the application. The application must—

(A) be under oath;

(B) contain information required by Commission regulations; and

(C) be served on persons designated by the Commission.

(2) The provisions of paragraph (2) of subsection (a) of this section shall not apply to applications under this section for authority to provide transportation as a motor contract carrier of passengers. The requirement that persons issued permits under this section as motor contract carriers of passengers be fit, willing, and able means safety fitness and proof of minimum financial responsibility under section 18 of the Bus Regulatory Reform Act of 1982.

(3) In deciding whether to approve the application of a person for a permit as a motor contract carrier of property, the Commission shall consider—

(A) the nature of the transportation proposed to be provided;

(B) the effect that granting the permit would have on the protesting carriers if such grant would endanger or impair their operations to an extent contrary to the public interest;

(C) the effect of denying the permit would have on the person applying for the permit, its shippers, or both; and

(D) the changing character of the requirements of those shippers.

(4) No motor carrier of property may protest an application to provide transportation as a motor carrier of property filed under this section unless—

(A)(i) it possesses authority to handle,in whole or in part, the traffic for which authority is applied;

(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

(5)(A) The provisions of paragraph (2) of subsection (a) of this section and paragraph (3) of this subsection shall not apply to applications under this section for authority to provide transportation by motor vehicle of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the permit, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage)which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this subparagraph and provides to the Commission such information and records as the Commission may require.

(B) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of permits to which the provisions of subparagraph (A) of this paragraph apply.

(6) With respect to applications of persons for permits as motor contract carriers of property, the Commission may not make a finding relating to the public interest under subsection (a)(2) of this section which is based upon general findings developed in rulemaking proceedings.

(7) The Commission may not deny any part of an application for a freight forwarder permit filed by a corporation controlled by, or under common control with—

(A) a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II, or III of chapter 105 of this title, because of the relationship between the corporation and that carrier; and

(B) a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 only because the service to be provided by the corporation will complete with service provided by another freight forwarder subject to subchapter IV of that chapter.

APPENDIX E

PAGE 12 OF COMMENTS OF AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATION, INC., ET AL. TO THE INTERSTATE COMMERCE COMMISSION IN EX PARTE NO. 230 (SUB-NO. 7)

* * *

do best - that is, volume transportation via the rail. Except in select instances, the railroads have left to others, particularly shippers' agents, the task of retailing intermodalism to the members of the general shipping public.[4] It would be extremely naive of the ICC to conclude that the railroads' concentration upon wholesale railroading reflects an inability to retail TOFC/COFC services due solely to continued regulation of the motor carrier portion of TOFC/COFC service.

As wholesalers of their services, the railroads have for the most part dealt with motor carriers desiring to use rail TOFC/COFC service in the same manner as third-party intermediaries. That is, the traditional joint rate "carrier-carrier" relationship between railroad and trucker is history. Rather, as the railroads could attest, the railroads have generally treated those motor carriers who desire to use their line-haul TOFC/COFC services like any other shipper. Those motor carriers enter into volume shipper contracts similar to the volume shipper contracts which third-party intermediaries enter into with the railroads. Simply, railroads and motor carriers are now in a "carrier-shipper" relationship.

When the shipments controlled by the ocean carriers, United Parcel Service, and United States Postal Service are discounted, the third-party intermediary shippers'

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[4] Underlying shippers of course have the opportunity to buy a ramp-to-ramp service, although not necessarily at the volume wholesale rates.

agents and shippers' associations easily account for in excess of seventy-five percent of the TOFC/COFC shipments moved by the nation's railroads. Traffic

* * *